Office - Supreme Court, U.S.
FILED
OCT 6 1982
ALEXANDER L. STEVAS,
CLERK

82-649

NO. 82-

in the

Supreme Court

of the

United States

October Term, 1982

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida Corporation,
Petitioners,

vs.

THE CITY OF HOMESTEAD, FLORIDA, A Florida Municipal Corporation,
Respondents.

On Petition for Writ Of Certiorari From The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

DEBORAH J. MILLER, Esquire
SIMON, SCHINDLER & HURST, P.A.
1492 South Miami Avenue
Miami, Florida 33130
305/358-8611
Attorney for Petitioners
ROBERT T. VAUGHN, Esquire
of Counsel
1111 Stahlman Building
Suite 1111
Nashville, Tennessee 37201
615/242-2550

QUESTIONS PRESENTED FOR REVIEW

The constitutionality of the Model Drug Paraphernalia Act, as promulgated by the United States Department of Justice and adopted by the Respondents herein, has been extensively challenged in the lower courts, resulting in a wide disparity of opinions among the Federal District and Circuit Courts. As the controversy grows and the conflicting United States District Court decisions continue to be heard by the Federal Circuit Courts, this case presents the following questions for review:

A. The Homestead Ordinance defines "drug paraphernalia" as all equipment, products, and materials of any kind which are used, intended for use, or designed for use in connection with a controlled substance. Does the phrase "designed for use" result in guilt through transferred intent of the designer, thus denying an accused violator due process of law?

B. Is the phrase "designed for use" as used to define "drug paraphernalia" unconstitutionally vague in that the merchants cannot tell whether items capable of lawful uses are within the ordinance's prohibitions? Further, does such vagueness permit arbitrary and discriminatory enforcement?

C. The definition portion of the Homestead Ordinance contains a listing of factors which, in addition to all logically relevant factors, may be considered in assessing whether a defendant has the requisite criminal intent. Is

the following factor unconstitutionally vague and provide a vehicle for arbitrary and discriminatory enforcement?:

Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.

D. The violations portion of the Homestead Ordinance, in part, renders it unlawful to deliver or possess with intent to deliver "drug paraphernalia", knowing, or under circumstances where one reasonably should know it will be used in connection with controlled substances. Further, advertising where one knows, or under circumstances where one reasonably should know its purpose, in whole or in part, is to promote the sale of objects designed or intended for use as "drug paraphernalia" is prohibited. Does the permissibility of a conviction merely because one "reasonably should have known" deny an accused due process by failing to require specific intent?

E. Is the aforementioned prohibition of an advertisement which, in whole "or in part," promotes the sale of objects designed or intended for use as "drug paraphernalia" overbroad in its infringement upon protected political speech, as well as its lack of geographic limits on its applicability?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i-ii

TABLE OF AUTHORITIES ..... vii-xii

OPINIONS BELOW 2

GROUNDS ON WHICH JURISDICTION IS INVOKED 2

CONSTITUTIONAL PROVISIONS, STATUTES & ORDINANCES INVOLVED 3

STATEMENT OF THE CASE 3-9

THE QUESTIONS ARE SUBSTANTIAL 9

I. THE OPINION OF THE ELEVENTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS OF THE SIXTH AND SEVENTH CIRCUIT COURTS OF APPEALS AS WELL AS OTHER FEDERAL COURTS INVALIDATING LAWS BASED UPON THE MODEL ACT 9-11

II. THE ISSUES PRESENTED ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT 11-14

TABLE OF CONTENTS (Continued)

Page

A—The Phrase "Designed For Use" Results In Guilt Through Transferred Intent Of The Designer, Thus Denying An Accused Violator Due Process Of Law 14-18

B—The Phrase "Designed For Use" Defining "Drug Paraphernalia" Is Unconstitutionally Vague In That The Merchants Cannot Tell Whether Items Capable Of Lawful Uses Are Within The Ordinance's Prohibitions. Further, Such Vagueness Permits Arbitrary And Discriminatory Enforcement 19-22

C—The Factor In The Definition Portion Of The Homestead Ordinance Which, Permits Consideration Of Whether One Is A "Legitimate Supplier" In Assessing Whether He Has The Requisite Criminal Intent Is Unconstitutionally Vague And Permits Arbitrary And Discriminatory Enforcement 22-24

D—The Permissibility Of A Conviction Merely Because One "Reasonably Should Know" Denies An Accused Due Process By Failing To Require Specific Intent 24-25

TABLE OF CONTENTS (Continued)

Page

E—The Aforementioned Prohibition Of An Advertisement Which, In Whole "Or In Part," Promotes The Sale Of Objects Designed Or Intended For Use As "Drug Paraphernalia" Is Overbroad In Its Infringement Upon Protected Political Speech, As Well As Its Lack Of Geographic Limits On Its Applicability 25-28

CONCLUSION 29

APPENDIX:

Ordinance No. 80-04-2A, City of Homestead Code of Ordinances ..... A. 2-10

Amended Complaint for Declaratory Relief . A. 11-23

Plaintiff's Motion for Summary Judgment .. A. 24-28

Defendant's Motion for Summary Judgment . A. 29-30

Order of District Court, Granting Summary Judgment:

Florida Businessmen for Free Enterprise, et al., v. The City of Homestead, No. 80-1160-Civ-NCR (S.D. Fla. 2/25/81) . A. 31-32

TABLE OF CONTENTS (Continued)

Page

Amended Order:

Florida Businessmen for Free Enterprise, et al., v. The City of Homestead, No. 80-1160-Civ-NCR (S.D. Fla. 4/3/81) . . A. 33-34

Order of District Court, Granting Summary Judgment:

Florida Businessmen for Free Enterprise, et al., v. The City of Hollywood, No. 80-6157-Civ-NCR (S.D. Fla. 8/29/80) . A. 35-45

Decision of United States Court of Appeals, Eleventh Circuit:

Florida Businessmen for Free Enterprise, v. City of Hollywood, and

Florida Businessmen for Free Enterprise, v. State of Florida, Nos. 80-5769, 80-5813 (11th Cir. 4/23/82) . A. 46-79

Decision of the United States Court of Appeals, Eleventh Circuit:

Florida Businessmen for Free Enterprise, et al., v. The City of Homestead, Florida, No. 81-5701 (11th Cir. 6/10/82) . . . . . A. 80

TABLE OF AUTHORITIES

Cases	Pages
Atkins v. Clements, No. Civ. 4-81-459-K (N.D. Tex. 9/24/81), *appeal dismissed* No. 81-1475 (5th Cir. 12/22/81)	11
Bigelow v. Virginia, 421 U.S. 809, (1975)	27
Brache v. County of Westchester, 658 F.2d 47 (2nd Cir. 1981)	10
Calhoon v. Harvey, 379 U.S. 134 (1964)	10
Casbah, Inc. v. Thone, 651 F.2d 551 (11th Cir. 1981), *cert. den.* 50 U.S.L.W. 3713 (3/8/82)	10, 18
Coates v. City of Cincinnati, 402 U.S. 611 (1971)	16
Delaware Accessories Trade Association v. Gebelein, 497 F.Supp. 289 (D. Del. 1980)	18
Dorchy v. State of Kansas, 264 U.S. 286 (1929)	23

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Florida Businessmen for Free Enterprise, Inc. v. City of Hollywood and *Florida Businessmen for Free Enterprise, Inc. v. Florida*, Consolidated case Nos. 80-5769 and 80-5813 (11th Cir. 4/23/82)	*passim*
Florida Businessmen for Free Enterprise, Inc. v. City of Hollywood, (11th Cir. 4/23/82)	*passim*
Florida Businessmen for Free Enterprise, Inc. v. City of Hollywood, No. 80-6157-Civ-NCR (S.D. Fla. 8/29/80)	6
Franza v. Carey, 518 F.Supp. 324 (S.D.N.Y. 1981)	10
General Store, Inc. v. Bingaman, No. Civil-80-0330 (D. N.M. 6/12/81), *appeal docketed*, No. 81-1681 (10th Cir. 6/23/81)	11
General Store, Inc. v. City of Albuquerque, No. 81-0027-M, Civil (D. N. Mex. 3/23/81)	10
Grayned v. City of Rockford, 408 U.S. 104 (1972)	14
Hejira Corporation v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981)	17

TABLE OF AUTHORITIES (Continued)

Cases	Pages
High Ol'Times, Inc. v. Busbee, No. 81-7019 (11th Cir. 4/23/82)	10
Indiana Chapter NORML, Inc. v. Sendak, No. TH-75-142-C (S.D. Ind. 2/4/80), *vacated as moot at time of appeal*, No. 80-1305 (7th Cir. 7/22/80)	19, 20
Information Management Services, Inc. v. Borough of Pleasant Hills, 512 F.Supp. 1066 (W.D. Pa. 1981)	10
Kansas Retail Trade Cooperative v. Stephan, 522 F.Supp. 632 (D. Kan. 1981), *appeal docketed* No. 81-2162 (10th Cir. 10/7/81)	11, 28
Knoedler v. Roxbury Township, 458 F.Supp. 990 (D.N.J. 1980)	25
Lady Ann's Oddities, Inc. v. Macy, 519 F.Supp. 1140 (W.D. Okla. 1981)	10
Lazy J., Ltd. v. Borough of State College, Civ. No. 80-1167 (M.D. Pa. 1/30/81)	10
Levas v. Village of Antioch, Illinois, No. 80-C-1574 (N.D. Ill. 4/22/80), *affirmed*, No. 80-1675 (7th Cir. 7/7/82)	16, 21, 25
Memphis Publishing Co. v. Leech, 539 F.Supp. 405 (W.D. Tenn. 1982)	27

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Mid-Atlantic Accessories Trade Association v. Maryland, 500 F.Supp. 289 (D. Del. 1980)	11, 18
New England Accessories Trade Association v. Browne, 502 F.Supp. 1245 (D. Conn. 1980) *appeal docketed* No. 81-7142 (2nd Cir. 2/24/81)	10, 18, 25
New England Accessories Trade Association v. Tierney, 528 F.Supp. 404 (D. Me. 1981), *appeal docketed*, No. 81-1886 (1st Cir. 12/21/81)	11
New England Accessories Trade Association v. City of Nashua, 679 F.2d 1 (1st Cir. 1982)	10
Nova Records, Inc. v. Sendak, 504 F.Supp. 938 (S.D. Ind. 1980), *appeal docketed* No. 81-1107 (7th Cir. 1/22/81)	11
Record Head Corporation v. Sachen, et al., 498 F.Supp. 88 (E.D. Wis. 1980), *affirmed in part and reversed in part*, No. 80-2518 (7th Cir. 7/7/82)	9, 21, 23
Record Revolution No. 6, Inc. v. City of Parma, 492 F.Supp. 1157 (N.D. Ohio 4/14/80)	23

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 103 (1981), *previous decision reaffirmed and reinstated*, Nos. 80-3308 and 80-3352 (6th Cir. 1/6/82), *vacated and remanded*, 102 S.Ct. 2227 (1982)	*passim*
Smith v. Gougen, 415 U.S. 566 (1974)	14
Stoianoff v. Montana, 529 F.Supp. 1197 (D. Mont. 1981)	11, 25, 28
Stoianoff v. Montana, 529 F.Supp. 1197 (D. Mont. 1981) and *Stoianoff d/b/a the Joint Effort v. Montana*, C.V. 81-140-M (D. Mont. 9/30/81), *appeals docketed* Nos. 82-3010 and 82-3024 (9th Cir. 1/9/82)	11
Tobacco Accessories and Novelty Craftsmen Merchants Association v. Treen, 501 F.Supp. 168 (E.D. La. 1980),	11
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 102 S.Ct. 1186 (1982)	*passim*

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Weiler v. Carpenter, 507 F.Supp. 837 (D. N. Mex. 1981)	10
Windfair, Inc. v. Busbee, No. Civ C-81-460-A (N.D. Ga. 9/8/81)	11
World Imports, Inc. v. Woodbridge Township, 493 F.Supp. 428 (D.N.J. 1980), *appeal dismissed* No. 80-1851 (3rd Cir. 9/17/80)	11
CONSTITUTIONAL AND STATUTORY PROVISIONS	
First Amendment, United States Constitution	3, 27, 28
Fourteenth Amendment, United States Constitution	3
Title 28, United States Code, Section 1254(1)	2
Title 28, United States Code, Section 1343	5
Title 42, United States Code, Section 1983	5
Homestead Ordinance, No. 80-04-28	3, 4, 14, 19, 23, 26
Village of Hoffman Estates Ordinance, No. 969-1978	12, 13, 14

NO. 82-

in the Supreme Court of the United States

October Term, 1982

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE,
an unincorporated association, and
MERLIN'S MUSIC, INC., a Florida Corporation,
Petitioners,

vs.

THE CITY OF HOMESTEAD, FLORIDA,
A Florida Municipal Corporation,
Respondents.

On Petition for Writ Of Certiorari
From The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, entered on June 10, 1982, appears in the Appendix, (A. 80). The Eleventh Circuit in the instant case relied exclusively upon *Florida Businessmen for Free Enterprise, Inc. v. City of Hollywood* and *Florida Businessmen for Free Enterprise, Inc. v. Florida*, consolidated case Nos. 80-5769 and 80-5813, (11th Cir. 4/23/82). (Hereinafter referred to as *Florida Businessmen for Free Enterprise, Inc. v. Hollywood*). The opinion in these consolidated cases appears in the Appendix, (A. 46-79).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The decision below was rendered on June 10, 1982. No rehearing was requested. On August 31, 1982, this Court granted an Extension of Time within which to Petition for Certiorari to October 8, 1982. Jurisdiction to review this judgment by Writ of Certiorari is conferred by 28 U.S.C. §1254(1). Certiorari review is appropriate because the case involves important questions of federal law which have not been, but should be settled by this Court. Further, this decision of the Eleventh Circuit Court of Appeals directly conflicts with decisions of the Sixth and Seventh Circuits, as well as with a multitude of Federal Courts below.

CONSTITUTIONAL PROVISIONS, STATUTES & ORDINANCES INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech. . . .

Fourth Amendment, United States Constitution:

> Section I. ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Ordinance No. 80-04-28, City of Homestead Code of Ordinances, is set forth in the Appendix, (A. 1-10).

STATEMENT OF THE CASE

The Model Act

In the fall of 1979, the United States Department of Justice drafted a "Model Drug Paraphernalia Act" (Model Act) as a proposal for lawmakers nationwide to adopt in an effort to limit access to and possession of drug paraphernalia, as well as information relating thereto. The City of Homestead adopted the Model Act.[1]

---

[1]The Model Act is codified in Ordinance No. 80-04-28, City of Homestead Code of Ordinances. (A. 1-10).

The Homestead Ordinance possesses four components. First, the term "drug paraphernalia" is defined to include "all equipment, products and materials of any kind which are used, intended for use, or designed for use" in connection with a controlled substance.[2] The second component provides that the term "drug paraphernalia" includes, but is not limited to the aforementioned definition. Following this second aspect of the definition is a supplemental list of many common items that can be paraphernalia if "used, intended for use, or designed for use" to violate drug laws.[3] Third, the ordinance enunicates several relevant factors which "may be considered" in determining whether the necessary criminal intent is present, so as to render an object illicit paraphernalia.[4]

The final portion of the ordinance contains three substantive offenses. These provisions proscribe, in relevant part, the manufacture or delivery of drug paraphernalia by one knowing, or under circumstances where one reasonably should know, that the paraphernalia will be used in connection with a controlled substance.[5] It is further unlawful to place an advertisement knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.[6]

---

[2]Homestead Ordinance §29-58.1 D.; (A. 4).

[3]Homestead Ordinance §29-58.1 D. 1.-12.; (A. 4-6).

[4]Homestead Ordinance §29-58.1 E., 1.-14.; (A. 7-8).

[5]Homestead Ordinance §29-58.3.; (A. 8-9).

[6]Homestead Ordinance §29-58.4.; (A. 9).

Violation of this ordinance's provisions may result in a fine up to five hundred dollars ($500.00), or imprisonment up to ninety (90) days, or both. Each day on which a violation occurs constitutes a separate offense.[7]

Proceedings in the Courts Below

This action was commenced in the United States District Court for the Southern District of Florida, pursuant to 42 U.S.C. §1983 by a Complaint for Declaratory and Injunctive Relief filed on May 14, 1980. On June 5, 1980, an Amended Complaint was filed to include additional parties. (A. 11-23). Jurisdiction was conferred upon the Court by 28 U.S.C. §1343.

The Amended Complaint alleged that printed materials and commercial speech were impermissibly prohibited by the ordinance. (A. 14-17). The ordinance was further assailed as vague and failing to provide sufficient warning of what items or conduct are prohibited, thus permitting arbitrary and discriminatory enforcement. (A. 15). Items possessing overwhelmingly legal uses were asserted to fall within the law's ambit without a sufficient stated governmental interest to support this prohibition. (A. 14-16). By Motion for Summary Judgment, memorandum and oral argument, Petitioners expounded their challenges, asserting that the standard of intent is vague and that it permits a conviction based upon the intent of another.

Through Cross-Motions for Summary Judgment, both sides represented the nonexistence of any disputed

---

[7] *Id.*

issue of material fact on which the other party might rely. (A. 24-30).

The District Court entered a Summary Judgment and, shortly thereafter, an Amended Summary Judgment in favor of the City upholding the ordinance in its entirety, relying upon its previous decision in *Florida Businessmen For Free Enterprise, Inc. v. Hollywood*, No. 80-6157-Civ-NCR (S.D. Fla. 8/29/80). (A. 31-32; 35-45).

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the lower Court's judgment citing its opinion in *Florida Businessmen for Free Enterprise, Inc. v. Hollywood*, in which, on April 23, 1982, it upheld a similar ordinance in its entirety. (A. 46-79).[8]

Treatment of the Issues in the Court Below

The issues before this Court were raised as part of the Petitioners' multi-faceted attack in the Federal District and Circuit Courts against the Homestead Ordinance.

The central issues focused on the definitional phrase "designed for use", the meaning of this phrase and whose intent was necessary to support a finding of guilt.

---

[8]Therefore, throughout this Brief discussion of the 11th Circuit's reasoning of its affirmance will be through reference to its opinion in *Florida Businessmen for Free Enterprise, Inc. v. Hollywood, supra.*

The Eleventh Circuit concluded that this phrase as contained in the definition portion of "drug paraphernalia", does not permit a conviction based upon the transferred intent of another. The Court reasoned that three states of mind on which the definition of drug paraphernalia relies (1) "used," (2) "intended for use," or (3) "designed for use" require proof of general criminal intent of the accused.[9]

The Eleventh Circuit also found that the phrase "designed for use" is not vague in failing to warn the merchants whether items capable of lawful uses are within the ordinance's prohibitions. The Court concluded that the "designed for use" standard encompasses items principally used with illegal drugs as determined by the objective physical features of the object in conjunction with the intent or plan of the manufacturer.[10]

The Court then addressed the indicium of criminal intent which "may be considered" in rendering an object drug paraphernalia; that is, "[w]hether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products . . . ." The Court upheld this provision on a basis that this indicium attempts to distinguish "head shops," the subject

---

[9]*Florida Businessmen for Free Enterprise, Inc. v. Hollywood, supra*, slip op. at 961; (A. 61).

[10]*Id.*, slip op. at 963; (A. 60).

of the ordinance, from other retail establishments which might sell objects with both innocent and prohibited uses. Noting that this element was struck by the Circuit Court of Appeals, Sixth Circuit in *Record Revolution No. 6, Inc. v. The City of Parma*,[11] the Court here agreed "that the risk of discriminatory enforcement inherent in this language is more than slight." It nevertheless precluded the merchants from raising this claim in a pre-enforcement proceeding.[12]

The Circuit Court declined to find the "reasonably should know" indicium of criminal intent in the definition of drug paraphernalia and the violations section of the ordinance unconstitutionally vague, or that this standard does not require specific intent of the accused for a conviction. The Court found that this standard does not punish innocent conduct, but establishes a scienter requirement that the defendant acted in bad faith, with intent or knowledge that the recipient will use the paraphernalia with controlled substances.[13]

Finally, the District Court held that the prohibition on advertising does not embrace protected non-commercial speech; that is, it does not address advertisements commenting upon the wisdom or efficiency of drug paraphernalia laws or any other matter. Rather, it merely

---

[11]638 F.2d 916, 933 n.24 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 103 (1981), *previous decision reaffirmed and reinstated*, Nos. 80-3308 and 80-3352, (6th Cir. 1/6/82), *vacated and remanded*, 102 S.Ct. 2227 (1982).

[12]*Florida Businessmen for Free Enterprise, Inc. v. Hollywood*, *supra*, slip op. at 963; (A. 64-65).

[13]*Id.*, slip op. at 962; (A. 63).

permissibly regulates the commercial marketing of items that may be used for an illicit purpose.[14] The Appeals Court rejected the view that the ordinance impermissibly applied to any advertiser regardless of where the advertisement is disseminated, as well as the contention that this prohibition is overbroad, holding that the State could ban commercial speech intended to encourage illegal activity.[15]

THE QUESTIONS ARE SUBSTANTIAL

I.

THE OPINION OF THE ELEVENTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS OF THE SIXTH AND SEVENTH CIRCUIT COURTS OF APPEALS AS WELL AS OTHER FEDERAL COURTS INVALIDATING LAWS BASED UPON THE MODEL ACT

The controversy over the constitutionality of the Model Act is plainly ripe for resolution by this Court. The decision underlying the Eleventh Circuit Court of Appeal's affirmance upholding the Model Act is in direct conflict with the opinion of the Sixth Circuit Court of Appeals in *Record Revolution No. 6, Inc.*, 638 F.2d 916 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 103 (1981), *previous decision reaffirmed and reinstated*, Nos. 80-3308 and 80-3352 (6th Cir. 1/6/82), *vacated and remanded*, 102 S.Ct. 227 (1982). Further, this decision is in direct conflict with that of the Seventh Circuit *in Record*

[14]Id., slip op. at 959; (A. 57).

[15]Id., slip op. at 960; (A. 57).

Head Corporation v. Sachen, et al., 498 F.Supp. 88 (E.D. Wis. 1980), *affirmed in part and reversed in part*, No. 80-2518, (7th Cir. 7/7/82).

Second, litigation over the Model Act has resulted in several Federal Circuit Court decisions, falling on all sides of the question. Those cases which have upheld laws based upon the Model Act include: *New England Accessories Trade Association, Inc. v. City of Nashua*, 679 F.2d 1 (1st Cir. 1982); *High Ol' Times, Inc. v. Busbee*, No. 81-7019 (11th Cir. 4/23/82); *Brache v. County of Westchester*, 658 F.2d 47 (2nd Cir. 1981) and *Casbah, Inc. v. Thone*, 651 F. [illegible]51 (11th Cir. 1981), *cert. den.* 50 U.S. L.W. 3713 (3/8/82).

Further litigation involving the Model Act has spawned a multitude of District Court decisions also falling on all sides of the issue.[16] Those cases which have ruled adversely to the Model Act include: *Franza v. Carey*, 518 F.Supp. 324 (S.D.N.Y. 1981); *Information Management Services, Inc. v. Borough of Pleasant Hills*, 512 F.Supp. 1066 (W.D. Pa. 1981); *Weiler v. Carpenter*, 507 F.Supp. 837 (D. N. Mex. 1981); *General Store, Inc. v. City of Albuquerque*, No. 81-0027-M, Civil (D. N. Mex. 3/23/81); *Lazy J., Ltd. v. Borough of State College*, Civ. No. 80-1167 (M.D. Pa. 1/30/81).

A second group of District Court decisions upheld the Model Act after severing portions of the law in question: *Lady Ann's Oddities, Inc. v. Macy*, 519 F.Supp. 1140 (W.D. Okla. 1981); *New England Accessories Trade Association v. Browne*, 502 F.Supp. 1245 (D. Conn. 1980)

[16] In *Calhoon v. Harvey*, 379 U.S. 134, 137 n.10 (1964), this Court took note of conflicting views among the district circuit courts in determining to grant certiorari.

appeal docketed No. 81-7142 (2nd Cir. 2/24/81); *Stoianoff v. Montana*, 529 F.Supp. 1197 (D. Mont. 1981) and *Stoianoff d/b/a the Joint Effort v. Montana*, C.V. 81-140-M (D. Mont. 9/30/81), appeals docketed Nos. 82-3010 and 82-3024 (9th Cir. 1/8/82) (oral argument had on September 9, 1982); *New England Accessories Trade Association v. Tierney*, 528 F.Supp. 404 (D. Me. 1981) appeal docketed, No. 81-1886 (1st Cir. 12/21/81) (all briefs filed); *Kansas Retail Trade Cooperative v. Stephan*, 522 F.Supp. 632 (D. Kan. 1981), appeal docketed No. 81-2162 (10th Cir. 10/7/81) (all briefs filed); *Windfair, Inc. v. Busbee*, No. Civ. C-81-460-A (N.D. Ga. 9/8/81).

A third line of District Court decisions have upheld laws based upon the Model Act; *Nova Records, Inc. v. Sendak*, 504 F.Supp. 938 (S.D. Ind. 1980), appeal docketed No. 81-1107 (7th Cir. 1/22/81); *Tobacco Accessories and Novelty Craftsmen Merchants v. Treen*, 501 F.Supp. 168 (E.D. La. 1980); *Mid-Atlantic Accessories Trade Association v. Maryland*, 500 F.Supp. 289 (D. Del. 1980); *World Imports, Inc. v. Woodbridge Township*, 439 F.Supp. 428 (D. N.J. 1980), *appeal dismissed* No. 80-1851 (3rd Cir. 9/17/80); *Atkins v. Clements*, No. Civ. 4-81-459-K (N.D. Tex. 9/24/81), *appeal dismissed*, No. 81-1475 (5th Cir. 12/22/81); *General Store, Inc. v. Bingaman*, No. Civil-80-0330 (D. N.M. 6/12/81), appeal docketed, No. 81-1681 (10th Cir. 6/23/81) (all briefs filed).

II.

THE ISSUES PRESENTED ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

The Drug Enforcement Administration of the United States Department of Justice drafted the Model Drug Paraphernalia Act which has resulted in legislation by at least 26 states patterned after the Model Act. Further, a resolution of the conflict between the Eleventh Circuit on the one hand, and the Sixth and Seventh Circuits on the other hand regarding the constitutionality of these laws will have a substantial impact upon merchants in states and municipalities across the nation.

This Court's recent decision in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 102 S.Ct. 1186 (1982), is not dispositive of the issues before us. This is so for several reasons. The Hoffman Regulation is a civil licensing law, not a criminal law.[17] Any item may be sold to an adult, so long as a license has been obtained. Sales of "drug paraphernalia" without a license are subject only to a fine.[18]

Moreover, the Village of Hoffman Estates has adopted administrative procedures under which any interested person may seek clarification of the meaning and application of any licensing ordinance from the Village.[19] The Ordinance here has no available similar administrative procedures.

The Hoffman Regulation prohibits only the sale of "drug paraphernalia" without a license.[20] Unlike the

---

[17] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra*, 102 S.Ct. at 1190, 1193-94.

[18] Hoffman Regulation, §3; *Id.* at 1197.

[19] *Id.* at 1190, n.4.

[20] Hoffman Regulation §1(A); *Id.* at 1194.

Homestead Ordinance, the Hoffman Regulation does not attempt to regulate the possession or use of "drug paraphernalia." That, in conjunction with other provisions of the Hoffman Regulation,[21] makes it clear that, unlike the Homestead Ordinance, the Hoffman Regulation was intended to regulate only sales by businesses.[22]

The Hoffman Regulation controls the sale of items which are "designed or marketed for use with illegal cannabis or drugs."[23] The phrase "designed . . . for use" is the only material portion of the Hoffman Regulation which has a direct counterpart in the Homestead Ordinance. The "marketing for use" standard in the Hoffman Regulation is not found in the Homestead enactment, and the "used" and "intended for use" terms in the Homestead Regulation are not found in the Hoffman Regulation.

Licensing guidelines prepared by the village attorney[24] lists specific items which are "conclusively designed" for use with illegal drugs and are therefore covered by

---

[21] *See* Hoffman Regulation §§ 1(b) (referring an "employee"), 1(D) (requiring that records be kept and be open to inspection "during hours of business"), 1(E) (requiring compliance with regulations of the Health Department), Id. at 1197).

[22] *See Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., supra*, at 1189. ("the ordinance in question requires a business to obtain a license. . . .").

[23] *Id.* at 1190.

[24] *Id.* at 1190, & n.3.

the Hoffman Regulation.[25] The list of items which are inclusive of but not determinative of whether an object constitutes "drug paraphernalia" in the Homestead Ordinance[26] is not comparable in the least to those contained in the Hoffman guidelines.

The ordinance's list of evidentiary factors which law enforcement officers, judges and juries may consider in determining whether particular items are illicit "drug paraphernalia" has no counterpart in the Hoffman Regulation. Finally, the Hoffman Regulation does not control advertising,[27] unlike the Homestead Ordinance.

Because this Court in *Hoffman* ruled upon the constitutionality of a civil licensing ordinance rather than a criminal law, the latter of which requires more stringent scrutiny and the application of different constitutional standards,[28] the issues presented herein should be settled by this Court.

A. THE PHRASE "DESIGNED FOR USE" RESULTS IN GUILT THROUGH TRANSFERRED INTENT OF THE DESIGNER, THUS DENYING AN ACCUSED VIOLATOR DUE PROCESS OF LAW

---

[25] Id. at 1194, & n.18.

[26] Homestead Ordinance §29-58.1 D. 1.-12. (A. 4-6).

[27] *See* Hoffman Regulation §1(A), *Village of Hoffman Estates, v. Flipside, Hoffman Estates, Inc., supra*, at 1197.

[28] *See Grayned v. City of Rockford*, 408 U.S. 104, 110, (1972); *Smith v. Gougen*, 415 U.S. 566 (1974).

In *Village of Hoffman Estates, v. Flipside, Hoffman Estates, Inc., supra*, this Court concluded that the phrase "designed for use" was not unconstitutionally vague on its face. In addressing whether the retailer's intent or manner of display is relevant and whether the intent of a third party, the manufacturer, is critical, since the manufacturer is the "designer", this Court stated: "[T]his term refers to the design of the manufacturer, not the intent of the retailer or customer." This Court heavily relied upon the "marketed for use" definition of drug paraphernalia to avoid a construction which would permit a retailer to be convicted based upon the intent of the designer

> *Whatever ambiguities the "design . . . for use" standard may engender, the alternative "marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise.* The guidelines referred to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items. The retail store therefore must obtain a license if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use. *The standard requires scienter,* since a retailer could scarcely "market" items "for" a particular use without intending that use.
>
> Under this test, Flipside had ample warning that its marketing activities required a license.

102 S.Ct. at 1195 (Emphasis supplied).

The Homestead Ordinance, unlike the Hoffman Regulation, does not contain the additional phrase "marketed for use," upon which the Hoffman Court so heavily relied. In an attempt to nevertheless overcome the constitutional attack, the Eleventh Circuit below held that a defendant may not be convicted based upon the transferred intent of others. Rather, concluded the Court, the three alternative states of mind on which the definition of drug paraphernalia relies—"use," "intended for use," or "designed for use"—require proof of general criminal intent of the accused.

It is well-established that a Court may not narrow a statute through construction in order to sustain it from constitutional attack, nor may a Federal Court rewrite a state statute.[29] The Eleventh Circuit took such impermissible action in construing the Homestead Ordinance. The definition of drug paraphernalia in the Homestead Ordinance is stated in the disjunctive; that is, "used, intended for use or designed for use". The Eleventh Circuit impermissibly construed a statute clearly written in the disjunctive as if it were drafted in the conjunctive, in an attempt to salvage it. This the Eleventh Circuit was not entitled to do. As the Seventh Circuit noted in *Levas v. Village of Antioch, Illinois*, No. 80-C-1574 (N.D. Ill. 4/22/80), *affirmed*, No. 80-1675 (7th Cir. 7/7/82):

> [We] recognize that *in the vagueness context, the canons of construction that would narrow a statute to avoid constitutional problems have*

---

[29]*See Record Revolution No. 6, Inc. v. The City of Parma, supra*, 638 F.2d at 926, quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

> *no place.* [Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra, 102 S.Ct. at 1191 n.6]. The statute must be construed to give full effect to any possible ambiguities.

slip op. at 11, *quoting Hoffman.*

It is indeed ironic that a decision upholding a drug paraphernalia ordinance best elucidates the unconstitutionality of the Homestead Ordinance as written. In *Hejira Corporation v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981), the Tenth Circuit relied upon the conjunctive nature of the three elements in the definition of drug paraphernalia in the ordinance before them, which points out the substantial difference between that enactment and the Homestead Ordinance (Model Act):

> It is well to remember that the Model Act and the Colorado Act are different. In the Model Act the definition of drug paraphernalia is stated in the disjunctive. Thus, the definition of drug paraphernalia in the Model Act encompasses items "used, intended for use or designed for use for illegal purposes." An item may constitute drug paraphernalia if any one of the three standards is met; that is, if the item is used, intended for use, or designed for use with illegal drugs, it constitutes paraphernalia. The definition of drug paraphernalia in the Colorado Act, however, is stated in the conjunctive. *Thus, an item may only constitute drug paraphernalia if it is intended for use and designed for use in one of the four enumerated ways. Regardless of whose*

intent the word "designed" refers to, the intent of the possessor or seller is still required by the words "and intended."

Id. at 1366-67.

The Eleventh Circuit and other Courts which have upheld Model Act Ordinances in the face of the instant attack have done so through an unworkable bootstrapping of the intent requirement contained in the violations provision.[30] These cases have "hinged the definition of drug paraphernalia on a specific intent to violate the Model Act Ordinances.

The salvaging attempt must fail for four reasons: (1) the Eleventh Circuit's determination that "designed for use" refers to the intent of the accused is in direct conflict with this Court's construction of that phrase in the Hoffman Ordinance. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra,* 102 S.Ct. at 1195; (2) the phrase "designed for use" as used to define drug paraphernalia is vague; (3) the factors which may be considered in assessing the presence of criminal intent are vague; and (4) intent may be impermissibly found merely because one "reasonably should have known" that a violation would arise.

---

[30] *See Casbah, Inc., v. Thone, supra,* 651 F.2d at 559; *Record Revolution No. 6, Inc., v. City of Parma, supra,* 638 F.2d at 928 & n.14; *New England Accessories Trade Association v. Browne, supra,* 502 F.Supp. at 1251; *Mid-Atlantic Accessories Trade Association v. Maryland, supra,* 500 F.Supp. at 844; *Delaware Accessories Trade Association v. Gebelein,* 497 F.Supp. 289, 292-93 (D. Del. 1980).

B. THE PHRASE "DESIGNED FOR USE" DEFINING "DRUG PARAPHERNALIA" IS UNCONSTITUTIONALLY VAGUE IN THAT THE MERCHANTS CANNOT TELL WHETHER ITEMS CAPABLE OF LAWFUL USES ARE WITHIN THE ORDINANCE'S PROHIBITIONS. FURTHER, SUCH VAGUENESS PERMITS ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

By the Homestead Ordinance, the Petitioners are able to establish that the "designed for use" standard is so vague as to specify no standard of conduct at all and thereby vague in all its applications, thus rendering the law invalid under Hoffman.[31]

This Court's determination that the phrase "designed for use" was not vague in all of its applications to the merchants therein was predicated upon licensing guidelines which listed several specific items as "conclusively 'designed' . . . for illegal use.[32] The evidence in that case establishes that those items were solely or principally useful with illegal drugs by virtue of objective physical features. *Id.* The Homestead Ordinance, in contradistinction, lists items which may, but do not necessarily constitute "drug paraphernalia".[33] Because

---

[31] *Id.* at 1191 & nn.5 and 7.

[32] *Id.* at 1190 & n.3.

[33] Homestead Ordinance §29-58.1 D 1.12. (A. 4-6). *Id., quoting Indiana Chapter NORML, Inc. v. Sendak,* No. TH-75-142-C (S.D. Ind. 2/4/80), *vacated as moot at time of appeal,* No. 80-1305 (7th Cir. 7/22/80) (Citation omitted).

the Petitioners do not sell any items which "conclusively" or "necessarily" constitute drug paraphernalia, the ordinance does not clearly apply to some of their activities, unlike the unquestionable application of the ordinance to the specified items in *Hoffman*.

In *Record Revolution No. 6, Inc., v. Parma, supra*, 638 F.2d 916, 930, the Sixth Circuit noted why the "designed for use" definition of a controlled substance is unconstitutionally vague:

> It is unclear what is meant by an instrument "designed" for drug use. The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the law] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.

Id., quoting Indiana Chapter NORML, Inc. v. Sendak, No. TH-75-142-C (S.D. Ind. 2/4/80), *vacated as moot at time of appeal*, No. 80-1805 (7th Cir. 7/22/80) (Citation omitted).

In addition, the Sixth Circuit held that the definition of drug paraphernalia in terms of "designed for use" presents the "danger of arbitrary and discriminatory enforcement of the ordinances by the police."

> This testimony suggests that the ordinances would be enforced only against "head shops," as designated by the local law enforcement officials. No guidelines have been written to prevent such selective discriminatory enforcement. Because the ordinances would permit at least the arrest and prosecution of persons by police and prosecutors who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance, the definition of drug paraphernalia is vague and overbroad.

Record Revolution No. 6, Inc. v. City of Parma, supra, 638 F.2d 916, 931.[34] Thus, the Eleventh Circuit here erred when it found and condoned the purposes of the Homestead Ordinance to be directed towards "head shops," saying:

> It is clear that this indicium attempts to distinguish "head shops", *the subject of this ordinance*, from other retail establishments

---

[34] The determination of the arbitrary and discriminatory enforcement issue by the Sixth and Seventh Circuits, even absent an arrest, points to the error of the Eleventh Circuit in the case sub judice in declining to address this challenge. *See Record Revolution No. 6, Inc. v. City of Parma, supra; Record Head Corporation v. Sachen, supra*, slip op. at 10-11; *Levas v. Village of Antioch, Illinois, supra*, slip op. at 13.

which might sell objects within both innocent and prohibited uses.

The ruling below points out the vagueness of the Ordinance. To permit enforcement of the Ordinance only against "head shops" further demonstrates the bootstrapping nature of the definition of "drug paraphernalia" because the common definition of a "head shop" is a store that sells "drug paraphernalia." Thus, discretion is placed with police officers to determine whether otherwise innocent household items are "drug paraphernalia" depending upon the *a priori* determination by the same police officers as to which business establishments are "head shops." The circular logic is readily apparent. Further, the substantial danger of arbitrary and discriminatory enforcement by permitting police to make these determinations also renders the Homestead Ordinance unconstitutional.

C. THE FACTOR IN THE DEFINITION PORTION OF THE HOMESTEAD ORDINANCE WHICH PERMITS CONSIDERATION OF WHETHER ONE IS A "LEGITIMATE SUPPLIER" IN ASSESSING WHETHER HE HAS THE REQUISITE CRIMINAL INTENT IS UNCONSTITUTIONALLY VAGUE AND PERMITS ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

In *Record Revolution No. 6, Inc. v. City of Parma, supra*, the Sixth Circuit agreed with its lower Court's finding that the factor of being a "legitimate supplier" is both unconstitutionally vague and overbroad. 638

F.2d 916, 933, n.24, approving *Record Revolution No. 6, Inc. v. City of Parma*, 492 F.Supp. 1157, 1171 (N.D. Ohio 4/14/80).

This factor, which is both general and unweighted, invites inquiry into an area of doubtful relevance rather than making the prohibited conduct any clearer. *See Record Head Corporation v. Sachen, supra*, slip opinion at 8-9, 11. Thus, again, a vehicle for arbitrary and discriminatory enforcement is supplied by permitting law enforcement officers to determine whether an individual is a "legitimate supplier".

Although the Homestead Ordinance contains a severability clause,[35] it is clear that judicial surgery via such a clause may not be utilized to constitutionally "save" the entire ordinance if all portions of the ordinance's scheme are dependent upon one another and all are directed to achieve a common directive. *See Dorchy v. State of Kansas*, 264 U.S. 286 (1929). In the case at hand, the *Dorchy* principle precludes judicial surgery of the "legitimate supplier" provision, which is utilized to determine whether the requisite criminal intent exists. This is so because a non-legitimate supplier is, within the meaning of the ordinance, the same as a "head shop" owner. As acknowledged by the Eleventh Circuit below and as previously discussed under Issue B of this Petition, this ordinance is specifically aimed at the "head shop" owner. Whether one falls within this category is the result of an *a priori* determination of law enforcement personnel, who then utilize this classification to determine whether an item constitutes drug

[35]Homestead Ordinance §29-58.5, Sect.3. (A. 10).

paraphernalia. Because this provision is so interwoven with the remaining portions of the ordinance, the entire ordinance must fall.

D. THE PERMISSIBILITY OF A CONVICTION MERELY BECAUSE ONE "REASONABLY SHOULD KNOW" DENIES AN ACCUSED DUE PROCESS BY FAILING TO REQUIRE SPECIFIC INTENT.

The violations portion of the Homestead ordinance, in part, renders it unlawful to deliver or possess with intent to deliver "drug paraphernalia", knowing, or under circumstances where one reasonably should know it will be used in connection with controlled substances. Further, advertising where one knows, or under circumstances where one reasonably should know its purpose, in whole or in part, is to promote the sale of objects designed or intended for use as "drug paraphernalia" is prohibited.

Unlike the Homestead Ordinance, the Hoffman Regulation did not contain a "reason to know" standard of intent. Consequently, this Court did not have an occasion to discuss the constitutionality of such a provision. The Eleventh Circuit below concluded that this standard establishes a scienter requirement that the defendant acted in bad faith, with intent or knowledge that the recipient will use the paraphernalia with controlled substances.[35] Such an unreasonably strained construction

---

[35] *Florida Businessmen For Free Enterprise, Inc. v. Hollywood, supra*, slip op. at 962; (A. 63).

of this Ordinance is constitutionally impermissible.[37] As the Sixth Circuit noted in *Record Revolution, No. 6, Inc.*:

> The "reason to know" standard is vague and overbroad. The district court aptly remarked: "Defining the offense of knowingly distributing drug paraphernalia in terms of the weakness of an individual's ability to preceive rather than his criminal intent provides insufficient guidance to the distributors covered by this subsection and to those persons charged with the responsibility of enforcing it." *See also:* Knoedler v. Roxbury Township, 485 F.Supp. 990, 993 (D.N.J. 1980). . . . Detective Bennett testified that the police would not know how to enforce the "reason to know" standard. Because most uses of the outlawed items are lawful and common, the "reason to know" standard is too open-ended and susceptible to misapplication to satisfy the dictates of due process.[38]

E. THE AFOREMENTIONED PROHIBITION OF AN ADVERTISEMENT WHICH, IN WHOLE "OR IN PART," PROMOTES THE SALE OF OBJECTS DESIGNED OR INTENDED FOR USE

---

[37] *See* pp. 16-17 of this brief, *supra*.

[38] 638 F.2d at 935-36 (Footnotes omitted). This language has been struck as unconstitutional by several other Federal Circuit and District Courts as well: *Levas v. Village of Antioch, Ill.; New England Trade Assn. v. Browne; Stoianoff v. Montana, supra*.

AS "DRUG PARAPHERNALIA" IS OVERBROAD IN ITS INFRINGEMENT UPON PROTECTED POLITICAL SPEECH, AS WELL AS ITS LACK OF GEOGRAPHIC LIMITS ON ITS APPLICABILITY.

The Homestead Ordinance prohibits advertising which promotes, *in whole or in part*, the use or sale of "drug paraphernalia."[39] The Eleventh Circuit again engaged in a contorted construction of the statute, ignoring the clear language "in part", in concluding that the ordinance does not include any speech other than the commercial marketing of items that may be used for an illicit purpose.[40] This analysis would require us to accept a legal fiction; that is, that one who is prosecuted for an advertisement which condemns the anti-drug paraphernalia ordinances, discusses the appropriateness of legal reform *and* which also offers "drug paraphernalia" for sale within the same ad will be prosecuted only for the latter conduct. This is a distinction without a difference inasmuch as the criminal sanctions remain the same regardless of whether the protected political speech was contained in the advertisement.

The Court did not address this issue in *Hoffman* where only the sale of items displayed near literature, not the literature itself, was regulated.[41]

---

[39]Homestead Ordinance §29-58.4.; (A. 9).

[40]*Florida Businessmen For Free Enterprise, Inc. v. Hollywood, supra*, slip op. at 959; (A. 57).

[41]*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra*, 102 S.Ct. at 1190, n.2 & 1192.

Based upon the same reasoning, the Eleventh Circuit's conclusion that only commercial speech which promotes illegal drug use is prohibited by the Homestead Ordinance must fail. As previously noted, the Hoffman Regulation did not contain the "in part" language at issue here. Consequently, this Court did not have an opportunity to address this issue.

The ban of the Homestead Ordinance, unlike that of the Hoffman Regulation, reaches beyond the geographic boundaries of the City of Homestead. The Ordinance reaches speech promoting the sale of items which the City might consider to be "drug paraphernalia" and other cities which legally permit the sale of such items. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court invalidated a state statute which prohibited the dissemination of information encouraging or promoting abortions. Despite the fact that the State of Virginia prohibited abortions and advertising relating thereto, this Court concluded that an editor of the Virginia Newspaper could not be convicted for printing an advertisement concerning abortion services which were legal in the State of New York. *Id.* at 822-24. *Accord Memphis Publishing Co. v. Leech*, 539 F.Supp. 405, 410-11 (W.D. Tenn. 1982).

The prohibition of the Homestead Ordinance is as geographically broad in scope as the statutes in *Bigelow* and *Memphis Publishing*. Because the ordinances prohibit advertisements which contain, in part, protected speech which concerns lawful activity, and its scope is not limited to advertisements with the sole purpose of promoting commercial transactions, the ordinance infringes upon speech protected by the First Amendment. While the Court in *Record Revolution No. 6, Inc. v. City*

of Parma, supra, concluded that the regulatory interests of the cities in stopping drug abuse is substantial and that the ordinances advance that interest, it properly held that their scope was more extensive than necessary to serve that interest. 638 F.2d at 947. *Accord, Kansas Retail Trade Cooperative v. Stephan; Stoianoff v. Montana, supra.* For these reasons, the Homestead Ordinance should be stricken as violative of the First Amendment to the United States Constitution.

CONCLUSION

The questions presented by this Petition for Review reflect a conflict among the Federal Circuit Courts of Appeals and present important questions of Federal law which have not been but should be settled by this Court. Consequently, probable jurisdiction should be noted.

RESPECTFULLY SUBMITTED,

DEBORAH J. MILLER, Esquire
Counsel of Record
Simon, Schindler & Hurst, P.A.
1492 South Miami Avenue
Miami, Florida 33130
305/358-8611

ROBERT T. VAUGHN, Esquire
Of Counsel
1111 Stahlman Building
Suite 1111
Nashville, Tennessee 37201
615/242-2550

NO. 82-

in the Supreme Court of the United States

October Term, 1982

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE,
an unincorporated association, and
MERLIN'S MUSIC, INC., a Florida Corporation,
Petitioners,

vs.

THE CITY OF HOMESTEAD, FLORIDA,
A Florida Municipal Corporation,
Respondents.

On Petition for Writ Of Certiorari
From The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

ORDINANCE NO. 80-04-28

AN EMERGENCY ORDINANCE OF THE CITY OF HOMESTEAD, FLORIDA, NECESSITATED BY CONSIDERATIONS OF THE HEALTH, SAFETY, AND WELFARE OF ITS CITIZENS AND INHABITANTS AMENDING CHAPTER 29, CODE OF LAWS, ENTITLED, "OFFENSES – MISCELLANEOUS", BY CREATING SECTIONS 29-58.1 THROUGH 29-58.5 TO PROHIBIT THE DISPLAY OR SALE OF INSTRUMENTS, SIMULATED DRUGS, SIMULATED CONTROLLED SUBSTANCES, OR OTHER NARCOTIC PARAPHERNALIA, PROVIDING A SEVERABILITY CLAUSE, AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City Council of the City of Homestead, Florida, has become very concerned about the increased use of illegal drugs and controlled substances within the City; and,

WHEREAS, the sale, advertisement and distribution of instruments, drug paraphernalia and simulated controlled substances, contribute to an atmosphere of community acceptance of illegal use of controlled substances; and

WHEREAS, the City Council finds that it is in the best interest of the health, safety and welfare, of the citizens of the City to restrict access to such drug paraphernalia;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOMESTEAD, DADE COUNTY, FLORIDA:

Section 1: That Chapter 29, Code of Laws, entitled "Offenses—Miscellaneous" be and is hereby amended by creating Sections 29-58.1 through 29-58.5 to read and provide as follows:

Sec. 29-58.1 Definitions.

A. "Controlled substance" means any drug or substance as described and defined in Florida Statutes Section 893.03, which is adopted by reference.

B. "Marijuana" means all parts of the plant of the species *Cannabis sativa, L.*, including all varieties thereof, whether growing or not; the seeds thereof, the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant which is incapable of germination.

C. "Person" means any individual natural person, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership or association or any other legal entity.

D. The term "Drug Paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this ordinance, or of any section of Chapter 893, Florida Statutes or Chapter 465, Florida Statutes. It includes, but is not limited to:

1. Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

2. Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances, or planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

3. Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

4. Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

5. Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

6. Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

7. Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

8. Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

9. Capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances;

10. Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

11. Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

12. Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing

marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chilams;

(l) Bongs;

(m) Ice pipes or chillers;

E. In determining whether an object is drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

1. Statements by an owner or by anyone in control of the object concerning its use;

2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

3. The proximity of the object, in time and space, to a direct violation of this ordinance;

4. The proximity of the object to controlled substances;

5. The existence of any residue of controlled substances on the object;

6. Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this ordinance; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this ordinance shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

7. Instructions, oral or written, provided with the object concerning its use;

8. Descriptive materials accompanying the object which explain or depict its use;

9. National and local advertising concerning its use;

10. The manner in which the object is displayed for sale;

11. Whether the owner, or anyone in control of the object, is a legitimate supplier or like or related items to the community, such as a licensed distributor or dealer of tobacco products;

12. Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

13. The existence and scope of legitimate uses for the object in the community;

14. Expert testimony concerning its use.

Sec. 29-58.2 Possession of Drug Paraphernalia.

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this ordinance.

Sec. 29-58.3 Manufacture or Delivery of Drug Paraphernalia.

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to

deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this ordinance.

Sec. 29-58.4 **Advertisement of Drug Paraphernalia.**

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonable should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

Sec. 29-58.5 **Penalty.**

Any person who violates any term, condition, or provision of Sec. 29-58.1 through 29-58.5 shall be liable, upon conviction by a court of competent jurisdiction, to a fine not to exceed Five Hundred Dollars ($500.00), or by imprisonment not to exceed ninety (90) days, or both, at the discretion of the court. Each day of violation of any term, provision, or condition of Secs. 29-58.1 through 29-58.5 shall constitute a separate and distinct offense.

Section 2: It is the intention of the City Council and it is hereby ordained that the provisions of this ordinance shall become and be made a part of the Code

of Laws of the City of Homestead, Florida, and the sections of this ordinance may be renumbered to accomplish such intention.

Section 3: If any word, phrase, clause, subsection or section of this ordinance is for any reason held unconstitutional or invalid, the invalidity thereof shall not affect the validity of any remaining portions of this ordinance.

Section 4: That all sections or parts of sections of the Code of Laws, all ordinances or parts of ordinances, and all resolutions or parts of resolutions, in conflict herewith, be and the same are hereby repealed to the extent of such conflict.

Section 5: That this ordinance shall take effect upon becoming a law.

PASSED AND ADOPTED this 21st day of April, 1980.

/s/ [illegible]
Mayor-Councilman
APPROVED AS TO FORM
AND CORRECTNESS:

/s/ [illegible]
City Attorney

ATTEST:

/s/ [illegible]
City Clerk
(Deputy)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-1160-Civ-JCP

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida corporation,

Plaintiffs,

vs.

THE CITY OF HOMESTEAD, FLORIDA, a Florida municipal corporation, NICHOLAS R. SINCORE, individually and as Mayor of the City of Homestead, and WILLIAM F. DICKINSON, individually and as Vice-Mayor of the City of Homestead, Florida and RUTH L. CAMPBELL, WILLIAM M. McCONNELL, WALTER C. RUTZKE, WILLIAM TOMMY WILSON and IRVING PESKOE, all individually as members of the City Council of the City of Homestead, Florida,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY RELIEF AND COMPENSATORY AND PUNITIVE DAMAGES

The Plaintiffs, FLORIDA BUSINESSMEN FOR FREE ENTERPRISE and MERLIN'S MUSIC, INC., by undersigned counsel, bring this action and state:

Jurisdiction

Count I of this Complaint is an action for declaratory relief, pursuant to 28 U.S. Code §2201, and preliminary injunctive relief ancillary thereto. Jurisdiction is conferred upon this Court by 28 U.S. Code §§ 1331 and 1343.

Count II of this Complaint is an action for compensatory damages, costs and attorneys' fees pursuant to 42 U.S. Code §1983. Jurisdiction is conferred upon this Court by 28 U.S. Code §1343.

Count III of this Complaint is an action for compensatory and punitive damages, costs and attorneys' fees as against the individual defendants pursuant to 42 U.S. Code §1983. Jurisdiction is conferred upon this Court by 28 U.S. Code §1343.

The actions of the Defendants have caused the Plaintiffs herein to suffer a deprivation of rights guaranteed under the First, Fifth and Fourteenth Amendments to the United States Constitution, as well as financial damages in excess of $10,000, exclusive of interest and costs.

Parties

The Plaintiff FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, is an unincorporated association whose members engage in the wholesale and retail distribution of certain items in interstate commerce, throughout Florida in general and in the CITY OF HOMESTEAD, FLORIDA, in specific.

The Plaintiff MERLIN'S MUSIC, INC., is a Florida corporation which operates a retail establishment at 797 N. E. Eighth Street, Homestead, Florida. The Plaintiff MERLIN'S MUSIC, INC. sells items which constitute a part of interstate commerce and which may or may not be proscribed under Ordinance No. 80-04-28, enacted by the Defendant CITY OF HOMESTEAD, on April 21, 1980.

The Defendant CITY OF HOMESTEAD, is a incorporated municipality within the State of Florida. On April 21, 1980, the CITY OF HOMESTEAD enacted Ordinance No. 80-04-28, a true copy of which is attached hereto and by reference made a part hereof.

The Defendant NICHOLAS R. SINCORE, is the duly elected Mayor of the Defendant CITY OF HOMESTEAD, FLORIDA, a municipal corporation [hereinafter "HOMESTEAD"], and is a resident of Dade County, Florida.

The Defendant WILLIAM F. DICKINSON, is the duly elected Vice-Mayor of HOMESTEAD, and is a resident of Dade County, Florida.

The Defendants, RUTH L. CAMPBELL, WILLIAM J. McCONNELL, WALTER C. RUTZKE, WILLIAM TOMMY WILSON, and IRVING PESKOE, are duly elected members of the City Council of HOMESTEAD, and are residents of Dade County, Florida.

At all times material hereto, each and every Defendant was acting "under color of [a] statute, ordinance, regulation, custom or usage of . . ." the State of Florida.

COUNT I

1. This is an action seeking declaratory relief against the Defendant CITY OF HOMESTEAD, FLORIDA, pursuant to Title 28, U.S.C. §2201.

2. The purpose and effect of Ordinance No. 80-04-28 is to prohibit possession, sale, or advertisement of certain items described in the ordinance as "drug paraphernalia." This ordinance defines "drug paraphernalia," inter alia, as such innocuous and overridingly lawful items as scales, spoons, bowls, containers, envelopes, and other objects "intended" for the described, prohibited use.

3. Ordinance No. 80-04-28 prescribes a criminal penalty for the possession, delivery or advertisement of those items vaguely defined in the ordinance. Upon conviction, any person who violates this ordinance may be liable "to a fine not to exceed Five Hundred Dollars ($500.00), or by imprisonment not to exceed ninety (90) days, or both. . . ."

4. The Plaintiffs are in the business of selling, both at wholesale and retail, items of jewelry, smoking accessories, and other articles which are or may be proscribed by the vague and overbroad language of the challenged ordinance. Plaintiffs are, therefore, precluded from pursuing their lawful business by the enactment and enforcement of this ordinance. Additionally, the Plaintiffs are prohibited by the ordinance from advertising or communicating to the public those items which the Plaintiffs hold for resale.

5. The challenged ordinance violates the due process clause of the Fifth and Fourteenth Amendments

to the United States Constitution by virtue of both vagueness and overbreadth in its language. The language of the ordinance is overbroad in that it proscribes activity which is constitutionally protected, and thus, violates the Plaintiffs' rights under the First Amendment to the United States Constitution. Additionally, the ordinance's definitional sections are so broad as to proscribe the possession and/or sale of items whose uses are overwhelmingly legal, without any legitimate relationship between this proscription and the health, safety, welfare, or morals of the people of the CITY OF HOMESTEAD.

6. The challenged ordinance is very vague in that it does not provide the Plaintiffs, or any persons of ordinary intelligence, with the requisite warning of that conduct which will be considered illegal in order that the Plaintiffs, and others, may conform their conduct accordingly. Additionally, by failing to provide ascertainable standards for the inclusion or exclusion of items, the ordinance fails to provide sufficient guidelines for its enforcement, promoting arbitrary and capricious enforcement in violation of the Fourteenth Amendment to the United States Constitution.

7. Ordinance No. 80-04-28 is unconstitutional in that it creates an irrebuttable presumption that the proscribed items described as "drug paraphernalia" *will be* used for unlawful purposes. This presumption is neither true in fact, nor supportable in law, and therefore, violates the Plaintiffs' right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

8. The challenged ordinance precludes advertisement of items vaguely defined as "drug paraphernalia" and therefore has a chilling effect prohibited by, and is violative of, the First Amendment rights of the Plaintiffs herein and the public at large.

9. The challenged ordinance constitutes an impermissible burden on interstate commerce in violation of the Commerce Clause, Article I, Section 8 of the United States Constitution, and constitutes a denial of the Plaintiffs' right to pursue their livelihood in a lawful manner.

10. The Plaintiffs have fully and completely complied with Ordinance No. 80-04-28 pending this action, in order to avoid criminal prosecution. The Plaintiffs have in the past, and are now, suffering irreparable harm and injury through the expenditure of large sums of money to separate, transport, and store those items which may be proscribed; a loss of sales and income due to the inability to sell their lawful merchandise; and loss of customers due to the nonavailability of these and other items which the Plaintiff has been forced to remove from its inventory due to the vagueness of the definitional sections of the challenged ordinance.

11. The Plaintiffs have in the past and continue to suffer the substantial and real threat of imminent prosecution through enforcement of the challenged ordinance as against the Plaintiffs, their agents and employees.

12. Lastly, Plaintiffs suffer a present inability to exercise their rights guaranteed under the First Amendment to the United States Constitution to

communicate with present and prospective customers concerning the items held for resale by the Plaintiffs, such restriction of First Amendment activities being irreparable harm and injury as a matter of law.

13. As an additional ground for the invalidity of the challenged ordinance, the same was enacted as an "emergency" ordinance, without providing either notice to those whose businesses are affected or an opportunity to be heard prior to the enactment and vigorous enforcement of the ordinance. In fact, no emergency exists, nor has it ever existed, and the procedure utilized by THE CITY OF HOMESTEAD in enacting this ordinance is void under the Florida and United States Constitutions.

WHEREFORE, and by reason of the foregoing, the Plaintiffs pray this Honorable Court will take jurisdiction of the within cause and:

A. Issue an order declaring that Ordinance No. 80-04-28 is void and unenforceable as the same violates the United States Constitution.

B. Issue a final order declaring the challenged ordinance to be void and unenforceable.

C. Award Plaintiffs costs and attorneys' fees in this action.

D. Grant such other and further relief as the Court deems just and equitable.

COUNT II

14. This is an action for compensatory damages, costs and attorneys' fees by the Plaintiffs against the Defendant CITY OF HOMESTEAD, FLORIDA, a municipal corporation, and the individual Defendants in their capacities as officers, agents, or officials of the CITY OF HOMESTEAD, FLORIDA, a municipal corporation, pursuant to 42 U.S. Code §1983.

15. The Plaintiffs reallege each and every allegation set forth above, as if fully set forth herein.

16. As a result of the enactment and vigorous enforcement of the challenged ordinance by the Defendants, the wholesaler members of the Plaintiff FLORIDA BUSINESSMEN FOR FREE ENTERPRISE have suffered, and continue to suffer, the inability to transact lawful business within the CITY OF HOMESTEAD, FLORIDA. Additionally, the wholesaler members of FLORIDA BUSINESSMEN FOR FREE ENTERPRISE are being restrained from advertising and/or offering their lawful wares for sale within the CITY OF HOMESTEAD, all of which amounts to a loss of profits in excess of $10,000, exclusive of interest and costs.

17. The Plaintiff MERLIN'S MUSIC, INC., a Florida corporation, has suffered severe financial damage in excess of $10,000, exclusive of interest and costs, by virtue of the following facts:

a. The Plaintiff MERLIN'S MUSIC, INC., a Florida corporation [hereinafter "MERLIN'S"] has been forced

to expend large amounts of money in removing, crating, transporting, and storing items arguably within the prohibition contained in the challenged ordinance, pending the outcome of this litigation.

b. MERLIN'S is unable to effect the sale of lawful items to its customers, and therefore, has lost both its customers and its revenues as a direct result of the Defendants' actions. MERLIN'S has suffered a loss of net profits in excess of $10,000 as of June 1, 1980, and continues to suffer lost profits in excess of $10,000 per month as a result of the actions of the Defendants.

c. MERLIN'S is presently unable to advertise its wares for sale to its customers, and engage in other activities protected by the First Amendment to the United States Constitution, thus, aggrevating the loss of business and net income identified above.

18. Both of the Plaintiffs have been forced to retain undersigned counsel to represent them in this cause, and have obligated themselves to pay a reasonable fee for the services rendered. Additionally, each Plaintiff has been forced to expend funds for court costs and other expenses both reasonable and necessary to the prosecution of this action.

WHEREFORE, and by reason of the foregoing, the Plaintiffs pray this Honorable Court will take jurisdiction of the within cause and set a prompt time for final hearing, following which it will assess compensatory damages against the Defendants, jointly and severally, award costs, attorneys's fees and such other and further relief as the Court deems just and equitable.

COUNT III

19. This is an action seeking compensatory and punitive damages, costs and attorneys' fees against the individual Defendants NICHOLAS R. SINCORE, WILLIAM F. DICKINSON, RUTH L. CAMPBELL, WILLIAM McCONNELL, WALTER C. RUTZKE, WILLIAM TOMMY WILSON and IRVING PESKOE, pursuant to 42 U.S. Code §1983.

20. The Plaintiffs reallege each and every allegation set forth above as if fully set forth herein.

21. Following the enactment of Ordinance No. 80-04-28, by the Defendants, acting as the City Council for the CITY OF HOMESTEAD, a hearing was held on the Plaintiffs' Application for Preliminary Injunction. Following that hearing, and after hearing argument of counsel for the CITY OF HOMESTEAD, as well as counsel for the Plaintiffs herein, the Court determined that based upon the "case law and memorandum provided, the Court finds that there is a substantial likelihood of success on the merits for movant." By this finding, the Court indicated a substantial likelihood that the ordinance here challenged would be found unconstitutional following a trial on the merits.

22. Additionally, each individual Defendant was afforded the opportunity to review decisions from ten courts which have considered similar ordinances, each of which court has found the ordinance to be unconstitutional.

23. On Monday, June 2, 1980, the individual Defendants were apprised that the Plaintiff MERLIN'S

MUSIC, INC., a Florida corporation, and the Plaintiff FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, were being deprived of their constitutionally protected right to engage in their lawful business as a result of the enforcement of this ordinance, and were further apprised that the damages incurred as of the date of that meeting were in excess of $10,000. Each Defendant was additionally advised that the Plaintiffs' damages would continue each and every day that the ordinance remained in effect and enforced by their direction, notwithstanding the constitutional infirmity of the ordinance.

24. Further, the individual Defendants were apprised, both by counsel for the Plaintiffs and by counsel for the CITY OF HOMESTEAD that the ordinance was likely to be held unconstitutional.

25. Based upon the foregoing, and in malicious disregard for the constitutional rights of the Plaintiffs, the Defendants conspired and confederated together to continue to enforce this void and unconstitutional ordinance against the Plaintiffs, well-knowing that there was no basis in law for that action. Further, the Defendants specifically intended, by their actions, to impose the financial harm upon the Plaintiffs as more fully set forth in Count II of this Complaint.

26. These actions of the individual Defendants were taken, not pursuant to any lawful duties imposed upon them by virtue of their offices, but rather out of personal animosity towards the Plaintiff MERLIN'S MUSIC, INC. in specific and FLORIDA BUSINESSMEN FOR FREE ENTERPRISE in general, and in complete

disregard to their obligations to uphold the Constitution of the United States of America.

27. The actions of the Defendants have resulted in the financial harm set forth in Count II of this Complaint, each and every item of which was well-known to the individual Defendants, and specifically intended by them in taking the actions identified above.

WHEREFORE, and by reason of the foregoing, the Plaintiffs pray that this Honorable Court will take jurisdiction of the within cause, grant compensatory and punitive damages against the individual Defendants, along with costs, attorneys' fees and such other and further relief as the Court deems just and equitable.

SIMON, SCHINDLER & TRIPP, P.A.
Attorneys for Plaintiffs
1492 South Miami Avenue
Miami, Florida 33130
(305) 358-8611

By: /s/ Theodore L. Tripp, Jr.
THEODORE L. TRIPP, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Complaint for Declaratory Relief and Compensatory and Punitive Damages has been hand delivered to Royall P. Terry, City Attorney, 790 North Homestead Boulevard, Homestead, Florida 33030, this 5th day of June, 1980.

By: /s/ Theodore L. Tripp, Jr.
THEODORE L. TRIPP, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-1160-Civ-JCP

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida corporation,

Plaintiffs,

vs.

THE CITY OF HOMESTEAD, FLORIDA, a Florida municipal corporation, NICHOLAS R. SINCORE, individually and as Mayor of the City of Homestead, Florida, and WILLIAM T. DICKINSON, individually and as Vice-Mayor of the City of Homestead, Florida and RUTH L. CAMPBELL, WILLIAM F. McCONNELL, WILLIAM TOMMY WILSON, WALTER RUTZKE, and IRVING PESKOE, all individually and as Council of the City of Homestead, Florida,

Defendants.

MOTION FOR SUMMARY JUDGMENT AS TO COUNT I, AND ESTABLISHING LIABILITY AS TO COUNT II

The Plaintiffs, FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida corporation, through undersigned counsel and pursuant to Rule 56, Federal Rules of Civil Procedure, present this Motion for Summary Judgment and state:

1. The pleadings in this cause, specifically the sworn Application for Preliminary Injunction previously filed herein, affirmatively disclose that there is no dispute as to the following material facts:

a. The Defendant CITY OF HOMESTEAD, is a duly incorporated city in the State of Florida. On April 21, 1980, the City Council for the CITY OF HOMESTEAD enacted Ordinance No. 80-04-28 [a true copy of which is attached hereto and by reference made a part hereof]. The purpose and effect of such ordinance is to prohibit the possession, delivery or advertisement of certain items described in the ordinance as "drug paraphernalia." The ordinance defines as "drug paraphernalia," inter alia, scales, spoons, bowls, containers, envelopes and other objects intended for the described prohibited use. The challenged ordinance carries a criminal penalty for the possession, delivery or advertisement of those items vaguely defined in the ordinance. THE CITY OF HOMESTEAD has declared its avowed intention to vigorously enforce, and is in fact, vigorously enforcing the challenged ordinance.

b. The Plaintiff FLORIDA BUSINESSMEN FOR FREE ENTERPRISE is an unincorporated association of wholesalers and retail businessmen doing business throughout Florida and in the CITY OF HOMESTEAD. The wholesaler members of Plaintiff FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, are in the business of selling to retail outlets merchandise which may or may not be prohibited by the vague and overbroad language of the challenged ordinance, and are therefore deprived of their right to engage in a lawful business. The members of the Plaintiff FLORIDA BUSINESSMEN, who are in the retail business of

selling objects arguably prohibited under the challenged ordinance, are prohibited by the ordinance from obtaining, advertising, or selling said merchandise, which severely diminishes their income and viability of their businesses and essentially curtails many of their retail business establishments.

c. The Plaintiff MERLIN'S MUSIC, INC. [hereinafter "THE STORE"] is in the business of selling gift items. THE STORE is a small record shop located in a shopping center at 797 N.E. Eighth Street, Homestead, Florida. THE STORE carries records, posters, and certain novelty items which may come within the ambit of the challenged ordinance. The removal of the latter items from Plaintiff's shop, in compliance with the ordinance results in a substantial loss of income to Plaintiff.

d. On May 14, 1980, the Plaintiffs filed a Complaint in this Court seeking declaratory and injunctive relief challenging the constitutionality of Ordinance No. 80-04-28, enacted and enforced by the CITY OF HOMESTEAD.

e. The Plaintiffs are, and since the effective date of enforcement have been, suffering substantial harm through the loss of business and substantial income as the direct result of the enactment and threat of imminent enforcement of the challenged ordinance. THE STORE has physically crated and removed a large percentage of its inventory from the place of business, because the language is so vague that Plaintiffs have been forced to remove all merchandise which arguably comes within the ambit of the ordinance. The Plaintiff

THE STORE, for example, expended a great deal of time, money, and effort to pack, move, and store all of the containers, spoons, jewelry, scales, mirrors, and bowls, among other items, which may arguably be prohibited by the challenged ordinance, in order to avoid criminal prosecution. All of the Plaintiffs continue to suffer a substantial loss of income, business, and customers due to compliance with the ordinance, which may result in bankruptcy. Furthermore, the ordinance's prohibition against advertising certain items constitutes a denial of First Amendment rights which even for minimal periods of time constitutes irreparable harm.

2. By reason of the authorities cited in the accompanying Memorandum of Law, the challenged ordinance is unconstitutional on its face, and the Defendant CITY OF HOMESTEAD is liable for the damages incurred by the enactment and enforcement thereof by the CITY against the Plaintiffs, as a matter of law.

3. Based upon the foregoing facts, as to which there is no dispute among the parties, the Plaintiffs are entitled to a Summary Judgment as to the liability of the Defendant CITY OF HOMESTEAD, as a matter of law, for the damages incurred by the Plaintiffs as a result of the enactment and enforcement of this ordinance by the Defendant CITY OF HOMESTEAD.

WHEREFORE, and by reason of the foregoing, the Plaintiffs pray this Honorable Court will enter an Order on Counts I and II, pursuant to Rule 56(d), Federal Rules of Civil Procedure, establishing the liability of the Defendant CITY OF HOMESTEAD, as a matter of law, for any damages suffered by the Plaintiffs as a result of the enactment and enforcement of this ordinance

by the Defendant CITY OF HOMESTEAD, and declaring the ordinance to be void and unconstitutional.

I HEREBY CERTIFY that a true copy of the foregoing Motion for Summary Judgment As to Count I, and Establishing Liability as to Count II has been furnished by hand delivery to Royall P. Terry, Jr., City Attorney, 790 North Homestead Boulevard, Homestead, Florida 33030, this 5th day of June, 1980.

SIMON, SCHINDLER
& TRIPP, P.A.
Attorneys for Plaintiffs
1492 South Miami Avenue
Miami, Florida 33130
(305) 358-8611

By: _____
THEODORE L. TRIPP, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO. 80-1160-Civ-NCR

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, etc., et. al.,

Plaintiffs,

vs.

THE CITY OF HOMESTEAD, etc., et al.,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, by and through their undersigned attorneys, and pursuant to Rule 56, Federal Rules of Civil Procedure, move for the entry of an order granting Summary Judgment, and as grounds therefore would state:

1) That Plaintiffs have filed a three count Amended Complaint in this cause seeking (a) a declaratory judgment ruling that Defendant, CITY OF HOMESTEAD'S, Oridnance Number 80-04-28 is unconstitutional; (b) compensatory damages for Defendant CITY OF HOMESTEAD; and (c) compensatory and punitive damages from the individual Defendant public officials.

2) That by reason of the authorities cited in the accompanying Memorandum of Law, the challenged ordinance is constitutional on its face.

3) That there is no genuine issue of fact, and all Defendants are entitled to summary judgment as a matter of law.

WHEREFORE, Defendants request that the Court enter summary judgment in favor of all Defendants herein, pursuant to Rule 56, Federal Rules of Civil Procedure, upholding the constitutionality of CITY OF HOMESTEAD Ordinance Number 80-04-28; Defendants further move for the entry of an order taxing their costs and attorneys fees against the Plaintiffs.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of September, 1980, to: THEODORE L. TRIPP, JR., ESQUIRE, ATTORNEY FOR PLAINTIFFS, 1492 SOUTH MIAMI AVENUE, MIAMI, FLORIDA 33130; ROYALL P. TERRY, CITY ATTORNEY, 790 N. HOMESTEAD BLVD., HOMESTEAD, FLORIDA 33030.

KUVIN, KLINGENSMITH
& LEWIS, P.A.
ATTORNEYS FOR DEFENDANTS
7160 S.W. 62ND AVE.
P.O. BOX 431481
SO. MIAMI, FLORIDA 33143
(661-5008)

BY: /s/ [illegible]
FOR: H. JACK KINGENSMITH

[Filed FEB 26, 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 80-1160-Civ-NCR

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association and MERLIN'S MUSIC INC.,

Plaintiffs,

Vs.

THE CITY OF HOMESTEAD, FLORIDA, etc.,

Defendants

ORDER GRANTING SUMMARY JUDGEMENT

This cause came on for oral argument on defendant's motion for summary judgement.

After a review of the record, and after considering the arguments advanced by counsel at oral argument, the Court is not persuaded that there are material facts at issue in this cause of sufficient gravity to warrant a finding that is not identical to *Florida Businessmen for Free Enterprise v. The City of Fort Lauderdale, et al.*, No. 80-6157-Civ-NCR. Plaintiffs' allegations of "selective enforcement," "discriminatory intent," and "systematic design" to harass are simply not supported in the record. Therefore the Drug Paraphrenalia Ordinance, as construed in *The City of*

Fort Lauderdale, is not repugnant to the United States Constitution. Accordingly, it is

ORDERED and ADJUDGED that summary judgement is hereby entered for defendants as against plaintiffs.

DONE and ORDERED this 25th day of Feb, 1981.

/s/ [illegible]
UNITED STATES DISTRICT JUDGE

CC: Simon, Schindler & Tripp
1492 South Miami Ave.,
Miami, Fl. 33130

Kuvin, Klingensmith & Lewis
7160 S.W. 62nd Ave.
P.O. Box 431481
So. Miami, Fl. 33143

[Received MAR 4 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 80-1160-Civ-NCR

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association and MERLIN'S MUSIC, INC.

vs.

THE CITY OF HOMESTEAD, FLORIDA, etc.

THIS CAUSE is before the court on motion of plaintiff to correct clerical error.

Upon consideration of the record, it is

ORDERED AND ADJUDGED that said motion is hereby granted. It is

FURTHER ORDERED that the order granting summary judgment in this cause where it refers to Case No. 80-1657-Civ-NCR is hereby amended to provide that the correct style of No. 80-6157-Civ-NCR is *FLORIDA*

BUSINESSMEN FOR FREE ENTERPRISE vs. THE CITY OF HOLLYWOOD.

DONE AND ORDERED this 3 day of April, 1981.

/s/ [illegible]
U.S. District Judge

cc: Simon, Schindler & Tripp
Kuvin, Klingensmith & Lewis PA

[Received APR 7 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 80-6157-Civ-NCR

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association; and M. P. D'ERRICO & SONS, FLORIDA, INC., a Florida corporation, d/b/a DANDYLION HUT

Plaintiffs

vs.

THE CITY OF HOLLYWOOD, a Florida municipal corporation

Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on for oral argument on cross-motions for summary judgment.

Plaintiffs commenced this action pursuant to 42 U.S.C. §1983 seeking a temporary restraining order, preliminary injunction, and permanent injunction to enjoin the enforcement of the City of Hollywood's ordinance No. 0-80-15, amending Chapter 21 of the City Code, which was enacted on February 20, 1980. Plaintiffs' motion for a temporary restraining order was denied and the application for a preliminary injunction was consolidated with the trial on the merits on an expedited basis, pursuant to Fed. R. Civ. P. 65(a)(2). The parties stipulated that there are no material facts at issue and that the court need only resolve the legal issues presented.

At the hearing on the merits the court requested and received supplemental memoranda. After a review of the record and after consideration of the arguments advanced by counsel, the court enters this order as its findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

HOLLYWOOD'S ORDINANCE

The city of Hollywood, Florida has recently enacted ordinance 0-80-15 (hereinafter "the ordinance"),[1] which has the avowed purpose of restricting public access to drug paraphenalia. The ordinance is based upon the "Model Drug Paraphernalia Act" (hereinafter M.D.P.A.) drafted by the Drug Enforcement Administration of the United States Department of Justice.

The ordinance prohibits the possession of drug paraphernalia, Sec. 21-81, the manufacture or delivery of drug paraphernalia, Sec. 21-82, and the placing of advertisements promoting the sale of drug paraphernalia, Sec. 21-83. Each violation of the ordinance is punishable by a maximum fine of five hundred dollars ($500), or by imprisonment not to exceed ninety (90) days, or both.

Because the ordinance seeks to restrict possession, distribution, and advertisement of drug paraphernalia, its definition of drug paraphernalia is critical. In pertinent part it provides:

---

[1]Hollywood's ordinance No. 0-8-15 is set out in the appendix of this order.

> The term "Drug Paraphernalia" means all equipment, products and materials of any kind which are *used, intended for use,* or *designed for use* in planting, propating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this ordinance. Section 21-80 (emphasis added).

Supplementing the definitional section is a seemingly endless, but not exclusive, list of items covered by the ordinance, Sec. 21-80 (A)(1)—(12)(M). Additionally, there are fourteen factors which are set forth intended, along with "other logically relevant factors", to aid in the determination of whether an object is drug paraphernalia within the meaning of the ordinance. Sec. 21-80(B)(1)—(14).

Section 21-82, which proscribes the manufacture and delivery of drug paraphernalia, and Section 21-83, which proscribes advertisement of drug paraphernalia, punish those acts where they are knowingly done. Additionally, a violation of the ordinance has occurred where one "reasonably should know" that an object will be employed in the preparation, processing, or consumption of a controlled substance, and a violation has occurred where one has placed an advertisement in the media, where one "reasonably should know that the purpose of the advertisement . . . is to promote the sale" of prohibited objects.

THE CHALLENGES

Plaintiffs are individuals who own the Dandylion Hut, a Hollywood business establishment which sells prohibited objects, and Florida Businessmen for Free Enterprise, an unincorporated association.

Plaintiffs attack the ordinance on three fronts; they allege that the ordinance is vague, that it is overbroad, and that it contravenes the First Amendment's guaranty of freedom of speech. Defendant strenuously argues that the ordinance is valid in its entirety, and that it is not repugnant to any right secured by the Constitution.

As a preliminary observation the court notes that abstention is not appropriate in this cause in light of the Fifth Circuit's holding in *High Ol' Times Inc. v. Busbee*, ____ F.2d ____ , No. 78-2192 (July 9, 1980). In *High Ol' Times*, the court concluded that the district court had erred in abstaining from considering the validity of the Georgia drug paraphernalia statute. Here, as in *High Ol' Times*, the issues "are all questions of federal constitutional law; there are simply no difficult, obscure, or unclear issues of state law." *Id.* at 7096. Nor is there an "ongoing state scheme or regulatory program involved here such that a federal ruling might engender confusion . . ." *Id.*

In recognition of the incidence of drug use and dependence, particularly among the young, states and individual communities have recently passed laws endeavoring to stem the tide. Hollywood's ordinance is typical in this respect. However, it is atypical in that it

is based upon the M.D.P.A. drafted by the federal Drug Enforcement Administration. The court will therefore not essay at great length on the other types of ordinances which have been challenged, except to note that they have been invalidated generally for sweeping too broadly;[2] a cannon is not sufferable where an arrow will suffice.

This opinion will scrutinize those cases in which the M.D.P.A. or statutes very similar to the M.D.P.A. have been construed in light of similar challenges. A perusal of the relevant authority confirms this court's initial analysis; the M.D.P.A., and therefore Hollywood's ordinance when given the reasonable and proper interpretation is not repugnant to the Due Process Clause and the First Amendment.

In general, legislative enactments which are vague do not provide notice to the ordinary person of what conduct is proscribed, nor are law enforcement officers provided with standards for enforcement. "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly . . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who review them." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294-2298, 33 L.Ed. 2d 218, 222-223 (1972) (notes omitted).

---

[2] *See generally, Knoedler v. Roxbury Township*, 485 F.Supp. 990 (D.N.J. 1980); *Bambu Sales, Inc. v. Gekson*, 474 F.Supp. 1297 (D.N.J. 1979); *Music Stop, Inc. v. City of Ferndale*, ____ F.Supp. ____ (E.D. Mich. 1980).

Additionally, overbreadth is also repugnant to the constitution because it deters privileged activity. *Id.*

The Eighth Circuit applied the vagueness standards as articulated in *Grayned v. City of Rockford* in *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980), and invalidated an ordinance which prohibited possession and sale of "drug-related devices." *Id.* at 28. However, in a footnote, the court noted that the M.D.P.A., as contrasted with the invalidated ordinance, is a "properly drawn ordinance." *Id.* at 28, n.4. The court's comments are, of course, dicta; however, it illustrates the judicial recognition of the narrowness of the M.D.P.A.

The M.D.P.A. has recently passed judicial muster in *Record Revolution, No. 6, Inc. v. City of Parma*, ____ F.Supp. ____, No. (80-35) (N.D. Ohio April 14, 1980). There the court concluded that the statute was valid, but it struck a portion of the complaint for vagueness. It reasoned that the indicium, "whether the owner or anyone in control of the object is a legitimate supplier . . .", is vague because there "are no guidelines as to what constitutes legitimacy." However, this court concludes that none of the indicia set forth in Section 21-80 (B)(1)-(14) are vague. The indicium directed to the issue of "legitimacy" is supplemented by an example. It is clear that this indicium attempts to distinguish "head shops", the subject of the ordinance, from other retail establishments which might sell objects with both innocent and prohibited uses. An ordinance need not be drafted with absolute certainty; the appropriate criteria is whether it is drafted so that its meaning is reasonably apparent. *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1945).

As previously mentioned, two portions of the ordinance (Section 21-82 and 21-83) proscribe conduct where one actually knows or "reasonably should know", that a violation of the ordinance is ensuing. These sections impose criminal penalties where there is actual intent to commit the proscribed acts, as well as where one ought to be aware that one is facilitating an act proscribed by the ordinance. Although the courts in *Record Revolution No. 6 Inc. v. City of Parma, supra*, and *Knoedler v. Roxbury Township*, 485 F.Supp. 990 (D.N.J. 1980), invalidate portions of the ordinance imposing a "reasonably should have known standard" this court concludes that the standard is not unconstitutionally vague. In *World Imports, Inc. v. Woodbridge Township*, No. 80-1414 (D.N.J. June 20, 1980), the district court considering an ordinance based on the M.D.P.A. reasoned that "reasonably should know" standard does not significantly differ from the actual knowledge standard. The court considers this reasoning sound. When the statute is applied there is really no difference between the two standards.

The ordinance does present problems in its attempt to define and apply intent. While it clearly prohibits the manufacture, delivery, possession, and advertisement of "drug paraphernalia", the indicia set forth in section 21-80(B)(1)-(14) could arguably support the interpretation that a manufacturer who sells an object without intent to commit the acts proscribed is subject to prosecution if the shopowner or the purchaser intends it for use as drug paraphernalia. A similar conclusion could be reached with regard to the shopowner who sells an object without intent to commit the acts proscribed. And further, an innocent purchaser might be subject to prosecution for

the acts and statements of those who distribute the item. Similarly, a person using an item described in section 21-80 (12)(A)-(M) without intent to use the item as drug paraphernalia would be subject to prosecution. These interpretations of the ordinance would not survive judicial scrutiny.

The more reasonable and plausible meaning and the one implicit in the ordinance, is that each defendant charged with violating the ordinance must have general criminal intent with respect to the offense alleged (as previously discussed "reasonably should have known" will suffice). As the court in *Record Revolution No. 6, Inc. v. City of Parma, supra,* stated:

> There are three forms of state of mind on which the definition of drug paraphernalia turns: "[A]ll equipment, products and materials of any kind which are (1) *used,* (2) *intended for use;* or (3) *designed for use* . . . in introducing into the human body . . . controlled substances. . . . The court construes each of these three elements as requiring the existence of general criminal intent by the defendant. Thus the criminal defendants voluntary and intentional use of an item with illegal drugs makes it drug paraphernalia within the meaning of the ordinance. Similarly, if the defendant intends an item for use with illegal drugs or designs for that use the item is drug paraphernalia. Adding the element of general intent not only narrows the scope of the ordinance, it insures that no one will be convicted because of mistake, accident or other innocent reason. For example,

> if a person smokes marijuana from a pipe believing it contains tobacco, he could not be convicted of using drug paraphernalia. . . . Similarly, if a person smokes tobacco in a waterpipe which was designed for use with drug paraphernalia because he did not intend to use the pipe to ingest an illegal controlled substance. *Id.* at 11.

This court is informed that the Sixth Circuit has stayed the judgment in *Record Revolution No. 6, Inc. v. City of Parma* pending consideration of the appeal filed by the plaintiffs in that case. Nevertheless, this court considers the district court's findings and logic sound, and it supports this court's conclusions. Additionally, the district court in *World Imports, Inc. v. Woodbridge Township, supra*, reached precisely the same result.

PROHIBITION OF ADVERTISING

Plaintiffs have argued that the ordinance's alleged overbreadth violates their First Amendment rights. Initially, plaintiff suggests that symbolic speech is prohibited by the ordinance. *See generally, Tinker v. Des Moines*, 393 U.S. 503, 21 L.Ed. 2d 731, 89 S.Ct. 733 (1969). As previously discussed, the court has concluded that general criminal intent is required before it can be said that a violation of the ordinance has occurred. Therefore, one intending to promote and express a political position does not have the requisite criminal intent to commit a proscribed act.

Speech which does no more than "propose a commercial transaction" is entitled to First Amendment protection. *Virginia State Board of Pharmacy v. Virginia*

Citizens Council, Inc., 425 U.S. 748, 761, 96 S.Ct. 1817, 1825 (1976). However, speech which solicits illegal activity is not protected. *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553 (1978). The justification for protection of commercial speech is that the free flow of commercial information benefits of the public. *Virginia State Board of Pharmacy, supra*, clearly, however, the free flow of information concerning drug paraphernalia has a potentially deleterious effect upon the community. Having concluded that the ordinance is valid and that the possession, manufacture, and delivery of drug paraphernalia can be proscribed, a logical corollary is that advertising intended to "promote the sale of objects designed or intended for use as drug paraphernalia" can be prohibited.

CONCLUSION

There can be little doubt that communities have a valid interest in preventing the proliferation of drug paraphernalia. This court believes and holds that the Model Drug Paraphernalia Act adopted in the City of Hollywood's Ordinance No. 0-80-15 as construed in this order, validly serves the community's interest and does not infringe upon rights secured by the Constitution.

Accordingly, it is

ORDERED AND ADJUDGED that defendant's motion for summary judgment shall be and is hereby granted.

DONE AND ORDERED this 29 day of August, 1980.

/s/ [illegible]
U S District Judge

attachment

cc- Simon, Schindler & Tripp
1492 South Miami Avenue
Miami, Florida 33130

cc- Sherman Bennett Mayor, Esq.
Suite 300
2450 Hollywood Blvd.
Hollywood, Florida 33020

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE,
Plaintiffs-Appellants,

v.

The CITY OF HOLLYWOOD,
Defendant-Appellee.

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an incorporated association, High Quality Headquarters, Inc., a Florida Corp., Three Guys Distributors, Inc., a Florida Corp., and Correct Count Co., Inc., a New York Corp.,
Plaintiffs-Appellants, Cross-Appellees,

v.

The STATE OF FLORIDA Jim Smith, as Attorney General of the State of Florida, Kenneth Katsaris, as a representative of the class of Defendants being the sixty-seven duly elected Sheriffs of the State of Florida, and Harry Morrison, etc.,
Defendants-Appellees, Cross-Appellants.

Nos. 80-5769, 80-5813.

United States Court of Appeals,
Eleventh Circuit.

April 23, 1982.

Consolidated appeals were taken by merchants from a judgment of the United States District Court for the Northern District of Florida, at Tallahassee,

Lynn C. Higby, J., upholding state "head shop" law, and a judgment of the United States District Court for the Southern District of Florida, at Ft. Lauderdale, Norman C. Roettger, Jr., J., upholding a similar ordinance. The Court of Appeals, Hatchett, Circuit Judge, held, inter alia, that: (1) the scope of advertising provisions of state and city "head shop" laws, which forbid placing in any publication "any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia," does not embrace protected noncommercial speech; (2) the respective laws' definition of drug paraphernalia as items "designed for use" with controlled substances gave fair notice of which items fall within the statutory prohibition; the phrase "designed for use" refers to structural features of objects deemed inherently fashioned for drug use, the intent implicated is that of the designer, and such intent is reflected by the objective physical characteristics of the finished product; and (3) the phrase "reasonably should know" in the respective laws was not impermissibly vague.

Affirmed.

See also, Fifth Circuit, 648 F.2d 956.

1. Constitutional Law—82(4)

Reviewing court will sustain a facial overbreadth challenge if the enactment reaches a substantial amount of constitutionally protected conduct engaged in by the complainant or others.

2. Drugs and Narcotics—46

Municipal Corporations—594(1)

Scope of the advertising provisions of state and city "head shop" laws, which forbid placing in any publication "any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia," does not embrace protected non-commercial speech. West's F.S.A. §893.147(4).

3. Constitutional Law—90.1(1)

Drugs and Narcotics—43

Municipal Corporations—594(1)

Insofar as any commercial speech interest was implicated by the ban of state and city "head shop" laws on advertisements promoting the sale of drug paraphernalia, the enactments were directed towards commercial activity promoting or encouraging illegal drug use, speech that is not entitled to First Amendment protection. West's F.S.A. §893.147(4); U.S.C.A.Const. Amend. 14.

4. Constitutional Law—90.1(1)

Although speech which merely proposes a commercial transaction is entitled to First Amendment protection, the government may regulate or ban entirely

commercial speech related to illegal activity. U.S.C.A. Const.Amend. 1.

5. Drugs and Narcotics—43

An enactment is not overbroad merely because it may encompass "innocent" and "lawful" uses of items as well as uses with illegal drugs.

6. Statutes—47

A law which does not impinge upon constitutionally protected conduct and thus survives an overbreadth claim may nevertheless suffer from vagueness.

7. Drugs and Narcotics—43

Municipal Corporations—594(2)

To succeed on their facial vagueness challenge to state and city "head shop" laws, merchants had to demonstrate that the statute and ordinance were impermissibly vague in all of their applications. West's F.S.A. §§ 893.145-893.147.

8. Constitutional Law—258(2)

Two basic requirements comprise the Fourteenth Amendment due process guarantee against vague statutes: laws must provide fair warning to persons of ordinary intelligence of the persons covered and the conduct prohibited, and must provide ascertainable standards of guilt to protect against arbitrary, erratic and discriminatory enforcement. U.S.C.A.Const.Amend. 14.

9. Constitutional Law—60

Without sufficiently precise standards in statutes, the legislature impermissibly delegates basic policy decisions to the personal predilections of police, prosecutors, and juries.

10. Criminal Law—13.1(1)

Statutes defining criminal offenses must be drawn with a greater degree of precision.

11. Drugs and Narcotics—43

Municipal Corporations—594(1)

State and city "head shop" laws' definition of drug paraphernalia as items "designed for use" with controlled substances gave fair notice of which items fall within the statutory prohibition; the phrase refers to structural features of objects deemed inherently fashioned for drug use, the intent implicated is that of the designer, and such intent is reflected by the objective physical characteristics of the finished product. West's F.S.A. §893.147(4).

12. Drugs and Narcotics—46

Municipal Corporations—594(1)

In respect to state and city "head shop" laws, the three states of mind on which the definition of drug paraphernalia relies, namely, "used," "intended for use," or "designed for use," require proof of general criminal intent of the accused. West's F.S.A. §893.147(4).

13. Drugs and Narcotics—43

Municipal Corporations—594(2)

In respect to state and city "head shop" laws prohibiting the use, possession with intent to use, delivery, possession with intent to deliver, and the manufacture with intent to deliver drug paraphernalia "knowing or under circumstances where one reasonably should know" that the recipient will use the paraphernalia with controlled substances, the phrase "reasonably should know" is not impermissibly vague. West's F.S.A. §893.147(4).

14. Criminal Law—568

Proof that a defendant reasonably should have known something is established in substantially the same manner as actual knowledge.

15. Constitutional Law—257.5

Municipal Corporations—121

While the risk of discriminatory enforcement inherent in the "legitimate supplier" language of state and city "head shop" laws is more than slight, merchants could raise such due process claim only in a postenforcement proceeding where they might attempt to show that the ordinance and statute were being enforced in an unconstitutional manner. West's F.S.A. §893.146(10).

16. Drugs and Narcotics—43

Municipal Corporations—594(2)

While merchants argued, in respect to state and city "head shop" laws, that the "design for use" and "reasonably should know" standards in the definition of drug paraphernalia and the legitimate supplier indicium were insufficiently explicit to prevent arbitrary enforcement, the ordinance and statute were drafted with sufficient specificity that this speculative danger of discriminatory and arbitrary enforcement could not render the laws void for vagueness. West's F.S.A. §§ 893.145-893.147.

17. Constitutional Law—46(1)

A facial challenge to the constitutionality of the subject drug paraphernalia enactments was not the appropriate time for litigating claims of selective enforcement; rather, such a claim could only be raised in a postenforcement proceeding when the possibility of selective enforcement had ripened into a prosecution.

Appeals from the United States District Court for the Northern District of Florida.

Appeal from the United States District Court for the Southern District of Florida.

Before THORNBERRY*, FAY and HATCHETT, Circuit Judges.

---

*Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

HATCHETT, Circuit Judge:

This consolidated appeal involves a review of the constitutionality of drug paraphernalia laws enacted by the State of Florida and the City of Hollywood to curb the increased incidence of drug abuse. The District Court for the Northern District of Florida upheld the state "head shop" law, but declared unconstitutionally vague and severed a portion of the statute prohibiting mere possession of drug paraphernalia. The District Court for the Southern District of Florida upheld a city ordinance which defines drug paraphernalia and prohibits its possession, manufacture, or sale in Hollywood. We affirm both decisions.

I. BACKGROUND

A. *Proceedings Below*

Appellants, Florida Businessmen for Free Enterprise, High Quality Headquarters, Inc., and Correct Count Company, Inc. (hereinafter State Merchants), as representatives of a plaintiff class of manufacturers, distributors, and retailers of arguably outlawed items, sought injunctive and declaratory relief from enforcement of Florida's allegedly unconstitutionally vague and overbroad "head shop" law. The United States District Court for the Northern District of Florida granted the state's motion to dismiss and certified defendants Katsaris, Sheriff of Leon County, and Morrison, State's Attorney for the Second Judicial Circuit of Florida, as representatives of the defendant class solely for the purpose of restraint by injunction. The court declared a provision of the statute unconstitutional, upheld the

remainder and issued a stay and injunction pending appeal prohibiting enforcement of the law in its entirety.

Appellants, Florida Businessmen for Free Enterprise and M. P. D'Errico & Sons, Florida, Inc. (hereinafter Hollywood Merchants), sought declaratory and injunctive relief in the District Court for the Southern District of Florida from the enforcement of an allegedly unconstitutionally vague and overbroad ordinance of the City of Hollywood, Florida. The district court denied the Hollywood Merchants' motion for a temporary restraining order, and pursuant to Rule 65(a)(2), Fed.R.Civ.P., consolidated the hearing on the preliminary injunction with the trial on the merits. On cross-motions for summary judgment, the district court upheld the ordinance under the fourteenth amendment due process clause and the first amendment and denied the Hollywood Merchants' motion for a stay pending appeal. A panel of the Fifth Circuit entered an injunction pending appeal precluding enforcement of the ordinance.

B. *The Drug Paraphernalia Laws*

The state head shop law, Fla.Stat. §§ 893.145-.147 (Supp.1982), like its city ordinance counterpart, is modelled after the Model Drug Paraphernalia Act (MDPA) (1975), drafted by the Drug Enforcement Administration of the United States Department of Justice. *See* Appendix A (setting forth text of state statute). Unlike the Hollywood ordinance and the MDPA, however, the state law mandates consideration of thirteen factors in determining whether an object is drug paraphernalia, whereas consideration of these same factors in the Hollywood ordinance and the MDPA is discretionary.

Hollywood, Florida, Ordinance No. 0-80-15 (Feb. 20, 1980), prohibits the use, possession with intent to use, manufacture, delivery, and advertisement of drug paraphernalia. *See* Appendix B (reprinting text of ordinance). "Drug paraphernalia" is defined as all items "used, intended for use, or designed for use" with controlled substances. A non-exclusive list of items within the ambit of the ordinance supplements the definitional section. The ordinance also permits consideration of fourteen factors in addition to "other logically relevant factors" in determining whether an object is drug paraphernalia. Section 21-82, which proscribes the manufacture and delivery of drug paraphernalia, and section 21-83, which proscribes the advertisement of drug paraphernalia, punishes the commission of those acts by one who knows or "reasonably should know" that the object will be used with illicit drugs or that the advertisement's purpose is to promote the sale of prohibited drug paraphernalia.

II. ISSUES

We must consider (1) whether the definition of "drug paraphernalia" and the prohibition against advertising drug paraphernalia is unconstitutionally overbroad; and (2) whether the definition of "drug paraphernalia" and the scienter requirement in these laws are impermissibly vague.**

**On cross appeal, the State argues that the District Court for the Northern District of Florida abused its discretion in declining to abstain or defer to state courts prior to declaring the provision proscribing mere possession unconstitutional. The subsequent amendment of Fla. Stat. §893.147(1) (Supp.1982) to prohibit possession *with intent to use* drug paraphernalia renders this issue moot on appeal.

III. *Overbreadth*

The State and Hollywood Merchants argue that the statute and ordinance are unconstitutionally overbroad because of the broad definition of drug paraphernalia. Specifically, they contend that the "designed for use" standard sweeps into its proscription a myriad of otherwise innocent and lawful objects. They also assert that the "reasonably should know" standard of knowledge is unconstitutional because it inhibits constitutionally protected conduct. The Merchants further argue that the ban against advertising drug paraphernalia impermissibly infringes "protected commercial speech" and "protected political speech" debating drug paraphernalia laws and the use of drugs.

[1] A reviewing court will sustain a facial overbreadth challenge if the enactment reaches "a substantial amount of constitutionally protected conduct" engaged in by the complainant or others. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ___ U.S. ___, ___, 102 S.Ct. 1186, 1189 91, 71 L.Ed.2d ___ (1982).

[2] Both the State and the Hollywood "head shop" laws forbid placing in any publication "any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia." Fla.Stat. §893.147(4) (Supp.1982); Hollywood, Florida, Ordinance No. 0-80-15, §21-83 (Feb. 20, 1980). We initially consider whether this provision infringes upon the first amendment rights of the Merchants or of others. This section is narrowly drawn to prohibit advertising

promoting the sale of "drug paraphernalia" within the meaning of the head shop laws. It does not address advertisements commenting upon the wisdom or efficiency of these laws nor upon any other matter. This provision does not regulate "speech as such, but simply regulates the commercial marketing of items that . . . may be used for an illicit purpose." *Flipside*, at ____, 102 S.Ct. at 1191. We therefore hold that the scope of the advertising provisions does not embrace protected noncommercial speech.

[3, 4] Insofar as the ban implicates any commercial speech interest, we note that the enactments here are directed towards commercial activity promoting or encouraging illegal drug use. Although speech which merely "propose[s] a commercial transaction" is entitled to first amendment protection, the government may regulate or ban entirely commercial speech related to illegal activity. *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 761, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 2350-51, 65 L.Ed.2d 341 (1980); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). The justification for protecting commercial speech is that the free flow of information in advertising benefits the public. *Virginia State Board of Pharmacy*, 425 U.S. 763-64, 96 S.Ct. 1826-27. As the district court noted in the instant case, however,

> the free flow of information concerning drug paraphernalia has a potentially deleterious effect upon the community. Having concluded that the

ordinance is valid and that the possession, manufacture, and delivery of drug paraphernalia can be proscribed, a logical corollary is that advertising intended to 'promote the sale of objects designed or intended for use as drug paraphernalia' can be prohibited.

[5] *Flipside* also decided that an enactment is not overbroad merely because it may encompass "innocent" and "lawful" uses of items as well as uses with illegal drugs. ____ U.S. at ____ n.9, 102 S.Ct. at 1192 n.9. The Merchants' assertion that they cannot ascertain whether the statute and ordinance regulate items with some lawful uses addresses vagueness. In *Flipside*, the Court deemed such a complaint premature in a preenforcement facial challenge. at ____ n.9, 102 S.Ct. at 1192 n.9. The Court also characterized the assertion that the provision would inhibit innocent uses of covered items as a complaint of denial of substantive due process, devoid of merit. At ____ n.9, 102 S.Ct. at 1192 n.9. The Court stated: "A retailer's right to sell smoking accessories, and a purchaser's right to buy and use them are entitled only to minimal due process protection. . . . Regulation of items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use." At ____ n.9, 102 S.Ct. at 1192 n.9 (citations omitted).

IV. VAGUENESS

[6, 7] A law which does not impinge upon constitutionally protected conduct and thus survives an overbreadth claim may nevertheless suffer from vagueness. To succeed on their facial vagueness challenge, however, the Merchants must demonstrate that the

statute and the ordinance are impermissibly vague in all of their applications. *Flipside*, at ____, 102 S.Ct. at 1191.

[8-10] Two basic requirements comprise the fourteenth amendment due process guarantee against vague statutes: Laws must provide fair warning to persons of ordinary intelligence of the persons covered and the conduct prohibited and must provide ascertainable standards of guilt to protect against arbitrary, erratic, and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). Without sufficiently precise standards in statutes, the legislature impermissibly delegates basic policy decisions to the personal predilections of police, prosecutors, and juries. *Smith v. Goguen*, 415 U.S. 566, 576, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 (1976). Further, statutes defining criminal offenses must be drawn with a greater degree of precision. *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1945). The State and Hollywood Merchants contend that certain phraseology in the Hollywood ordinance and the Florida statute violates these constitutional criteria.

A. *Fair Notice*

1. *"Designed for Use."*

[11] Quoting extensively from *Indiana Chapter, NORML v. Sendak*, 631 F.2d 734 (7th Cir. 1980), the Merchants argue that the definition of drug paraphernalia as items "designed for use" with controlled substances

fails to give fair notice of which items fall within the statutory prohibition. Specifically, they assert that the definition is unclear with respect to whether prohibited devices must be suited solely for drug use or may encompass multi-purpose objects which include legitimate uses. The Merchants also criticize the phrase as unconstitutionally ambiguous for failing to precisely state who is intended as designer. The Merchants thus argue that this language permits an accused to be prosecuted and convicted based on the transferred intent of another.

Like the trial courts in the instant cases, numerous courts have upheld "designed for use" language against similar challenges. *See, e.g., The Casbah, Inc. v. Thone,* 651 F.2d 551, 559-60 (8th Cir. 1981), *cert. denied,* ____ U.S. ____, ____ S.Ct. ____, 71 L.Ed.2d ____, 50 U.S.L.W. 3713 (U.S. Mar. 8, 1982); *Mid-Atlantic Accessories Trade Association v. Maryland,* 500 F.Supp. 834, 844-45 (D.Md.1980); *Delaware Accessories Trade Association v. Gebelein,* 497 F.Supp. 289, 291-92 (D.Del.1980). The United States Supreme Court recently decided that "designed for use" language is not unconstitutionally vague on its face. The Court held that this standard encompasses items principally used with illegal drugs as determined by the objective physical features of the object in conjunction with the intent or plan of the manufacturer. *Flipside,* ____ U.S. at ____, 102 S.Ct. at 1193 (1982). The Court stated that:

> [A] business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer. It is also sufficiently clear that items

which are principally used for nondrug purposes, such as ordinary pipes, are not 'designed for use' with illegal drugs.

At ____, 102 S.Ct. at 1193.

[12] We therefore hold that the phrase "designed for use" refers to structural features of objects deemed inherently fashioned for drug use and that the intent implicated is that of the designer (i.e., patent holder or manufacturer). We further hold that the designer's intent for a design is reflected by the objective physical characteristics of the finished product. To ensure that defendants will not be convicted based on the transferred intent of others, we also note that the three states of mind on which the definition of drug paraphernalia relies—(1) "used," (2) "intended for use," or (3) "designed for use"—require proof of general criminal intent of the accused. *See, The Casbah, Inc. v. Thone*, 651 F.2d 551, 559 (8th Cir. 1981), *cert. denied*, ____ U.S. ____, ____ S.Ct. ____, 71 L.Ed.2d ____, 50 U.S.L.W. 3713 (U.S. Mar. 8, 1982); *Delaware Accessories Trade Association v. Gebelein*, 497 F.Supp. 289, 292-93 (D.Del.1980); *Record Revolution No. 6, Inc. v. City of Parma*, 492 F.Supp. 1157, 1169-70 (N.D.Ohio), *rev'd*, 638 F.2d 916, 928 & n.14 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 103, 101 S.Ct. 2998, 69 L.Ed.2d 384 (1981).

2. *"Reasonably Should Know."*

[13] The Hollywood and Florida Merchants also argue that the "reasonably should know" language in the sections defining substantive offenses is vague. The Hollywood ordinance prohibits the use, possession

with intent to use, the delivery, the possession with intent to deliver, and the manufacture with intent to deliver drug paraphernalia "knowing or under circumstances where one reasonably should know" that the recipient will use the paraphernalia with controlled substances. Hollywood, Fla., Ordinance No. 0-80-15, §21-82. The Florida Statute contains the same prohibitions. Both laws further prohibit any advertising "under circumstances where one reasonably should know" that the purpose of the advertisement is to promote the sale of objects designed or intended for use with drug paraphernalia. Fla.Stat. §893.147(4) (Supp.1982); Hollywood, Fla., Ordinance No. 0-80-15, §21-83 (Feb. 20, 1980). Both trial courts in the instant case held that the "reasonably should know" language was constitutionally permissible. The Hollywood and State Merchants argue, however, that this constructive knowledge standard lacks a specific intent requirement and thus fails to give notice to innocent persons of what constitutes prohibited conduct.

[14] We hold that the phrase "reasonably should know" is not impermissibly vague and adopt the reasoning advanced by the district courts. We note that proof that a defendant reasonably should have known something is established in substantially the same manner as actual knowledge. "Even if someone testifies that he told a defendant something, the defendant's knowledge may be inferred only if the trier of fact proves that the defendant heard, understood, and believes what he was told." *World Imports, Inc. v. Woodbridge Township*, 493 F.Supp. 428, 433 (D.N.J.1980).

Further support is found in the many statutes imposing criminal liability under a "reasonably should

know" standard and which have withstood constitutional attack. *See, e.g., The Casbah, Inc. v. Thone*, 651 F.2d at 561 n.13 (collecting federal statutes). Florida courts also have construed this standard to require proof that "the circumstances of the transaction were sufficiently suspicious to put a person of ordinary intelligence and caution on inquiry." *Hutton v. State*, 332 So.2d 686, 687 (Fla.Dist.Ct.App.1976); *B. S. v. State*, 320 So.2d 459, 461 (Fla.Dist.Ct.App.1975).

We also hold that this standard is sufficiently certain to provide fair notice to persons of ordinary intelligence of its meaning and application. *See Gorin v. United States*, 312 U.S. 19, 27-28, 61 S.Ct. 429, 433-434, 85 L.Ed. 488 (1941); *United States v. Featherston*, 461 F.2d 1119, 1121-22 (5th Cir. 1972). The "reasonably should know" standard does not punish innocent or inadvertent conduct but establishes a scienter requirement that the defendant acted in bad faith, with intent or knowledge that the recipient will use the paraphernalia with controlled substances.

3. *Factors Relevant to Determining Drug Paraphernalia: "Legitimate Supplier".*

Section 21-80B in the ordinance and section 893.146 in the statute lists fourteen and thirteen indicia, respectively, that law enforcement authorities must consider in determining whether an object is "drug paraphernalia." In this appeal, the Merchants attack only the factor of being "a legitimate supplier" as vague and overbroad. The relevant provision states:

> In determining whether an object is drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:
>
> . . .
>
> 11. Whether the owner, or anyone in control of the object, is a *legitimate supplier* of like or related items to the commodity, such as a licensed distributor or dealer of tobacco products . . . .

Hollywood, Fla., Ordinance No. 0-80-15, §21-80B(11) (Feb. 20, 1980) (emphasis added); *accord* Fla.Stat. §893.146(10) (Supp. 1982).

The district court upheld this provision in the Hollywood ordinance, stating that the "legitimate supplier" guideline "is supplemented by an example. It is clear that this indicium attempts to distinguish 'head shops,' the subject of the ordinance, from other retail establishments which might sell objects with both innocent and prohibited uses." The court in *Record Revolution No. 6 v. City of Parma*, however, deleted this same provision from the three ordinances reviewed for creating a danger of arbitrary and discriminatory enforcement. 638 F.2d 916 at 933 n.24. The district court therein stated that the reference to "legitimate suppliers" is imprecise and misleading because the ordinance applies to *all* who use, distribute, or advertise even an innocent item with the requisite intent. 492 F.Supp. 1157, 1171 (N.D.Ohio 1980).

[15] We agree that the risk of discriminatory enforcement inherent in this language is more than

slight. Nevertheless, we hold that appellants may raise this due process claim only in a post-enforcement proceeding where they may attempt to show that the ordinance and the statute are being enforced in an unconstitutional manner.

B. *Adequacy of Standards for Enforcement*

[16] The Merchants also assert that the "designed for use" and "reasonably should know" standards in the definition of drug paraphernalia and the legitimate supplier indicium are insufficiently explicit to prevent arbitrary enforcement. This imprecision, appellants argue, will foster selective enforcement only against "head shops" by police and prosecutors "who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance."

[17] We hold that the ordinance and statute here were drafted with sufficient specificity that this speculative danger of discriminatory and arbitrary enforcement cannot render the ordinance void for vagueness. The Merchants have introduced no evidence indicative of discriminatory enforcement. A facial challenge to the constitutionality of the subject drug paraphernalia enactments is not the appropriate time for litigating claims of selective enforcement. Regardless of the risk of discriminatory enforcement, the Merchants may raise this claim only in a post-enforcement proceeding when the possibility of selective enforcement has "ripen[ed] into a prosecution." *Flipside*, ____ U.S. ____ at ____ nn.21 & 22, 102 S.Ct. at 1196 nn.21 & 22. Such abstract claims of discriminatory enforcement possess due process implications only when bolstered by specific applications of the drug paraphernalia laws.

VI. CONCLUSION

We hold that these drug paraphernalia laws enacted by the State of Florida and the City of Hollywood are neither unconstitutionally vague nor overbroad.

We now dissolve all injunctions entered in these consolidated cases.

AFFIRMED.

APPENDIX A

Fla.Stat. §§ 893.145-.147 (Supp.1982)

893.145 *"Drug Paraphernalia" defined*

The term "drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. Drug paraphernalia is deemed to be contraband which shall be subject to civil forfeiture. The term includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances.

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.

(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.

(9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.

(11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes, with or without screens, permanent screens, hashish heads, or punctured metal bowls.

(b) Water pipes.

(c) Carburetion tubes and devices.

(d) Smoking and carburetion masks.

(e) Roach clips: meaning objects used to holding burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.

(f) Miniature cocaine spoons, and cocaine vials.

(g) Chamber pipes.

(h) Carburetor pipes.

(i) Electric pipes.

(j) Air-driven pipes.

(k) Chillums.

(l) Bongs.

(m) Ice pipes or chillers.

893.146 *Determination of paraphernalia*

In determining whether an object is drug paraphernalia, a court or other authority or jury shall consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use.

(2) The proximity of the object, in time and space, to a direct violation of this act.

(3) The proximity of the object to controlled substances.

(4) The existence of any residue of controlled substances on the object.

(5) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.

(6) Instructions, oral or written, provided with the object concerning its use.

(7) Descriptive materials accompanying the object which explain or depict its use.

(8) Any advertising concerning its use.

(9) The manner in which the object is displayed for sale.

(10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor of or dealer of tobacco products.

(11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.

(12) The existence and scope of legitimate uses for the object in the community.

(13) Expert testimony concerning its use.

893.147 *Use, possession, manufacture, delivery, or advertisement of drug paraphernalia*

(1) *Use or possession of drug paraphernalia.* — It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia:

(a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or

conceal, a controlled substance in violation of this chapter; or

(b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

Any person who violates this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) *Manufacture or delivery of drug paraphernalia.* —It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used:

(a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this act; or

(b) To inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this act.

Any person who violates this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) *Delivery of drug paraphernalia to a minor.* —Any person 18 years of age or over who violates subsection (2) by delivering drug paraphernalia to a

person under 18 years of age is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) *Advertisement of drug paraphernalia.*—It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

APPENDIX B

ORDINANCE NO. 0-80-15

AN ORDINANCE OF THE CITY OF HOLLYWOOD, FLORIDA, AMENDING CHAPTER 21, CODE OF ORDINANCES, ENTITLED, "OFFENSES, MISCELLANEOUS PROVISIONS", BY CREATING SECTIONS 21-80 THROUGH 21-84 THEREOF, TO PROHIBIT THE DISPLAY OR SALE OF INSTRUMENTS, SIMULATED DRUGS, SIMULATED CONTROLLED SUBSTANCES, OR OTHER NARCOTIC PARAPHERNALIA, PROVIDING A SEVERABILITY CLAUSE, AND PROVIDING AN EFFECTIVE DATE

WHEREAS, the City Commission of the City of Hollywood, Florida, has become very concerned about the increased use of illegal drugs and controlled substances within the City; and

WHEREAS, the sale, advertisement and distribution of instruments, drug paraphernalia and simulated controlled substances, contribute to an atmosphere of community acceptance of illegal use of controlled substances; and

WHEREAS, the City Commission finds that it is in the best interest of the health, safety and welfare, of the citizens of the City to restrict access to such drug paraphernalia;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF HOLLYWOOD, FLORIDA:

Section 1: That Chapter 21, Code of Ordinances, entitled "Offenses, Miscellaneous Provisions" is amended by creating Sections 21-89 through 21-84 to read and provide as follows:

Sec. 21-80. *Definitions.*

A. The term "Drug Paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this ordinance. It includes, but is not limited to:

1. Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or

harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

2. Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

3. Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

4. Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

5. Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

6. Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

7. Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

8. Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

9. Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

10. Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

11. Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

12. Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to holding burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs;

(m) Ice pipes or chillers.

B. In determining whether an object is drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

1. Statements by an owner or by anyone in control of the object concerning its use;

2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

3. The proximity of the object, in time and space, to a direct violation of this ordinance;

4. The proximity of the object to controlled substances;

5. The existence of any residue of controlled substances on the object;

6. Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to

deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this ordinance; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this ordinance shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

7. Instructions, oral or written, provided with the object concerning its use;

9. National and local advertising concerning its use;

10. The manner in which the object is displayed for sale;

11. Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

12. Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

13. The existence and scope of legitimate uses for the object in the community;

14. Expert testimony concerning its use.

Sec. 21-81. *Possession of Drug Paraphernalia.*

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate,

cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this ordinance.

Sec. 21-82. *Manufacture or Delivery of Drug Paraphernalia.*

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this ordinance.

Sec. 21-83. *Advertisement of Drug Paraphernalia.*

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

Sec. 21-84. *Penalty.*

Any person who violates any term, condition, or provision of Secs. 21-81 through 21-83 shall be liable,

upon conviction by a court of competent jurisdiction, to a fine not to exceed Five Hundred Dollars ($500.00), or by imprisonment not to exceed ninety (90) days, or both, at the discretion of the court. Each day of violation of any term, provision, or condition of Secs. 21-81 through 21-83 shall constitute a separate and distinct offense.

Section 2: It is the intention of the City Commission and it is hereby ordained that the provisions of this ordinance shall become and be made a part of the Code of Ordinances of the City of Hollywood, Florida, and the sections of this ordinance may be renumbered to accomplish such intention.

Section 3: If any word, phrase, clause, subsection or section of this ordinance is for any reason held unconstitutional or invalid, the invalidity thereof shall not affect the validity of any remaining portions of this ordinance.

Section 4: That all sections or parts of sections of the Code of Ordinances, all ordinances or parts of ordinances, and all resolutions or parts of resolutions, in conflict herewith, be and the same are hereby repealed to the extent of such conflict.

Section 5: That this ordinance shall be in full force and effect immediately upon its passage and adoption.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-5701
Non-Argument Calendar

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE,
an unincorporated association, and
MERLIN'S MUSIC, INC., a Florida Corporation,
Plaintiffs-Appellants,

versus

THE CITY OF HOMESTEAD, FLORIDA,
A Florida Municipal Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

June 10, 1982

Before HILL, VANCE and HATCHETT, Circuit Judges.

PER CURIAM:

AFFIRMED. *See Florida Businessmen for Free Enterprise, Inc. v. Florida*, No. 80-5813 (11th Cir. Apr. 23, 1982); *Florida Businessmen for Free Enterprise, Inc. v. City of Hollywood*, No. 80-5769 (11th Cir. Apr. 23, 1982).

Office-Supreme Court, U.S.
FILED
DEC 14 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-649

in the Supreme Court of the United States

October Term, 1982

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida Corporation
Petitioners,

vs.

THE CITY OF HOMESTEAD, FLORIDA, A Florida Municipal Corporation,
Respondents.

On Petition For Writ of Certiorari From The United States Court of Appeals For the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

JOHN S. FREUD, ESQUIRE
of Counsel
GUREN, MERRITT, UDELL, SOGG & COHEN
1200 Brickell Avenue
Miami, Florida 33131
(305) 372-0122

H. JACK KLINGENSMITH, ESQUIRE
GUREN, MERRITT, UDELL, SOGG & COHEN
8th Floor
1200 Brickell Avenue
Miami, Florida 33131
(305) 372-0122
Attorney for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii-vi

STATEMENT OF THE CASE 1-2

GROUNDS WHY THIS CAUSE SHOULD NOT BE REVIEWED

I. SUMMARY 3-4

A. THERE IS NO SUBSTANTIAL CONFLICT IN THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL

B. THE UNITED STATES SUPREME COURT HAS HELD THAT MUNICIPALITIES CAN CONSTITUTIONALLY REGULATE OR PROHIBIT THE DISSEMINATION OR PROLIFERATION OF DRUG PARAPHERNALIA

C. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS UPHOLDING THE HOMESTEAD ORDINANCE IS CORRECT

TABLE OF CONTENTS (Continued)

Page

D. PETITIONERS HAVE FAILED TO COMPLY WITH RULE 21.1(b), S.CT. U.S., i.e. ALL PARTIES TO THE PROCEEDINGS IN THE ELEVENTH CIRCUIT HAVE NOT BEEN LISTED IN THE PETITION

II. VAGUENESS

A. "DESIGNED FOR USE" 5-7

B. "LEGITIMATE SUPPLIER" 7-9

C. "REASONABLY SHOULD KNOW" 9-11

III. OVERBREADTH 11-15

IV. CONCLUSION 16

APPENDIX:

Order Denying Preliminary Injunction Entered By District Court RA.2-7

Final Judgment Entered by District Court RA.8

Resolution No. 80-07-21 City of Homestead, Florida RA.9-11

TABLE OF AUTHORITIES

Cases	Pages
Atkins v. Clements, 529 F.Supp. 735 (N.D. Tex. 1981), Appeal Dismissed ___ F.2d ___ (5th Cir. 1981)	3
Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222 (1975)	14, 15
Brache v. County of Westchester, 658 F.2d 47 (2d Cir. 1981)	3
B. S. v. State, 320 So.2d 459 (Fla. 3d Dist. Ct. App. 1975)	11
Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981), *cert. den.* ___ U.S. ___, ___, S.Ct. ___, 71 L.Ed.2d ___, 50 U.S.L.W. 3713 (U.S. 3/8/82)	3, 5, 12
Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)	12
Deleware Accessories Trade Association v. Gebelein, 497 F.Supp. 289 (D. Del. 1980)	5
Florida Businessmen, Etc. v. City of Hollywood, 673 F.2d 1213 (11th Cir. 1982)	3, 6, 9, 14
Florida Businessmen, Etc. v. City of Homestead, 679 F.2d 252 (11th Cir. 1982)	4

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Gorin v. United States, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed.488 (1941)	11
Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)	5
Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981)	3, 5
High Ol'Times, Inc. v. Busbee, 673 F.2d 1225 (11th Cir. 1982)	3, 5
Hutton v. State, 332 So.2d 686 (Fla. 1st. Dist. Ct. App. 1976)	11
Mid-Atlantic Accesories Trade Association v. Maryland, 500 F.Supp. 834 (D. Md. 1980)	5
Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed.940 (1934)	13
New England Accessories Trade Association, Inc. v. City of Nashua, 679 F.2d 1 (1st Cir. 1982)	3
Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973)	12

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Record Head Corporation v. Sachen, 682 F.2d 672 (7th Cir. 1982)	4
Record Revolution No. 6 v. City of Parma, 638 F.2d 916 (6th Cir. 1980), vacated and remanded, 451 U.S. 103 (1981), previous decision reaffirmed and reinstated, Nos. 80-3308 and 80-3352 (6th Cir. 1/6/82), vacated and remanded, ___ U.S. ___, 102 S.Ct. 2227, 69 L.Ed.2d 384 (1982)	3
Selzman v. United States, 268 U.S. 466, 45 S.Ct. 574 (1925)	10
United States v. Featherston, 461 F.2d 1119 (5th Cir. 1972), *cert. den.* 409 U.S. 991 (1972)	10
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., ___ U.S. ___, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)	4, 6, 7, 9, 11, 13, 16
Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)	12
Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed.563 (1955)	13

TABLE OF AUTHORITIES (Continued)

Cases	Pages
World Imports, Inc. v. Woodbridge Township, 493 F.Supp. 428 (D.N.J. 1980), appeal dismissed ____ F.2d ____ (3rd Cir. 1980)	3, 5
STATUTORY PROVISIONS	
Florida Statutes, Sections 893.145-.147 (Supp. 1982)	14
Model Drug Paraphernalia Act	3
Ordinance No. 80-04-28, City of Homestead Code of Ordinances	1, 4, 7, 8
Resolution No. 80-07-21, City of Homestead Code of Ordinances	9
Rule 21.1(b), Rules of The Supreme Court of The United States	4
Title 8, United States Code, Section 1185 (a)(2)	10
Title 15, United States Code, Sections 78dd-1, 78dd-2, 1397, 1916, 2068, 2614	10
Title 18, United States Code, Sections 922, 954, 1384, 2154, 2423, 2512, 4921	10
Title 26, United States Code, Section 999	10
Title 42, United States Code, Sections 263, 5409	10
Title 46, United States Code, Section 1461	10

STATEMENT OF THE CASE

Respondent adopts Petitioners' Statement of the Case with the following exceptions:

THE ORDINANCE

On April 21, 1980, the City of Homestead, Florida duly enacted Ordinance No. 80-04-28 in an effort to stem the tide of drug abuse by restricting the dissemination of drug paraphernalia within its borders.

The Homestead Ordinance is divided into five (5) parts, the thrust of which is to prohibit (1) the use or possession, (2) the manufacture or delivery and (3) the advertisement of "drug paraphernalia".

The heart of the ordinance is its definition of the term "drug paraphernalia" which is set forth in Section 29-58.1. (A.3-8).

Supplementing this definition are twelve (12) subsections of the ordinance which detail a non-exclusive list of objects which are considered "drug paraphernalia" when used, intended for use or designed for use by an individual in conjunction with controlled substances. (A.4-6). The ordinance also delineates fourteen (14) factors which may be considered in determining whether a particular object is "drug paraphernalia". (A.7-8).

The definition of "drug paraphernalia" does not stand alone. Three separate sections of the ordinance identify those activities which are unlawful and each of those sections incorporates the definition of "drug paraphernalia" by reference. (A.8-9).

THE PROCEEDINGS BELOW

Petitioners' application for the issuance of a preliminary injunction was denied by the District Court which found that there had been no showing of arbitrary or discriminatory enforcement of the Ordinance by the City of Homestead. (RA.2-7).

Petitioners' alleged arbitrary and discriminatory enforcement in their amended complaint (A.15), but shortly after the Ordinance was enacted Petitioners and Respondent concluded negotiations which resulted in the adoption of a resolution by the City staying enforcement of the ordinance against the Petitioners. (RA.9-11).

At the hearing on the motions for summary judgment Petitioners offered no proof of selective enforcement and actually conceded that the Ordinance had not been enforced against them. (A.24-30).

In granting summary judgment for the City, the District Court concluded that Petitioners' allegations of selective enforcement, discriminatory intent and systematic design to harass were not supported by the record. (A.31).

GROUNDS WHY THIS CASE SHOULD NOT BE REVIEWED

I. SUMMARY

The petition for writ of certiorari filed by the Petitioners attacks the Homestead Ordinance on the grounds that it is unconstitutionally vague and overbroad. Nevertheless, it is respectfully submitted that the Court should not grant review of the petition because:

a) There is no substantial conflict in the decisions of the Circuit Courts of Appeal which have considered the constitutionality of statutes or ordinances based on the Model Drug Paraphernalia Act (M.D.P.A.);[1]

---

[1]The Courts of Appeal which have approved legislation based on the M.D.P.A. include the First, Second, Third, Fifth, Eighth, Tenth and Eleventh. See *New England Accessories Trade Association, Inc. v. City of Nashua*, 679 F.2d 1 (1st Cir. 1982); *Brache v. County of Westchester*, 658 F.2d 47 (2d Cir. 1981); *World Imports, Inc. v. Woodbridge Township*, 493 F.Supp. 428 (D.N.J. 1980), appeal dismissed ___ F.2d ___ (3d Cir. 1980); *Atkins v. Clements*, 529 F.Supp. 735 (N.D. Tex. 1981), appeal dismissed ___ F.2d ___ (5th Cir. 1981); *Cashbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. denied* ___ U.S. ___, ___ S.Ct. ___, 71 L.Ed.2d ___, 50 U.S.L.W. 3713 (U.S. 3/8/82); *Hejira Corp. v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981); *High Ol'Times, Inc. v. Busbee*, 673 F.2d 1225 (11th Cir. 1982); *Florida Businessmen, Etc. v. City of Hollywood*, 673 F.2d 1213 (11th Cir. 1982).

In contrast, only the Sixth and Seventh Circuits have struck down drug paraphernalia statutes or ordinances spawned by the M.D.P.A. See *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916 (6th Cir. 1980), vacated and remanded, 451 U.S. 103 (1981), previous decision reaffirmed and reinstated, Nos. 80-3308

b) In *Village of Hoffman Estates v. Flipside*, ____ U.S. ____, 102 S.Ct. 1186, 71 L.Ed.2d 362(1982), this Court unanimously held that municipalities can regulate or prohibit the dissemination or proliferation of drug paraphernalia without violating Constitutional safeguards;

c) The decision of the Eleventh Circuit Court of Appeals upholding the Homestead Ordinance (No. 80-04-28) is correct;[2] and

d) Petitioners have failed to comply with Rule 21.1(b), S.Ct. U.S., i.e. all parties to the proceedings in the Eleventh Circuit have not been listed.[3]

(Footnote 1 Continued)

and 80-3352 (6th Cir. 1/6/82), vacated and remanded, ____ U.S. ____, 102 S.Ct. 2227, 69 L.Ed.2d 384 (1982); *Record Head Corporation v. Sachen*, 682 F.2d 672 (7th Cir. 1982). However, the United States Supreme Court has on two separate occasions rejected the Sixth Circuit's decision and in *Hoffman Estates* gave the Seventh Circuit advance notice of its unequivocal approval of municipal legislation aimed at the activities of head shops.

[2]*Florida Businessmen, Etc. v. City of Homestead*, 679 F.2d 252 (11th Cir. 1982).

[3]The following persons were also named Defendants in the proceedings below: Nicholas R. Sincore, William F. Dickinson, Ruth L. Campbell, William M. McConnell, Walter Rutzke, William Tommy Wilson and Irving Peskoe.

II. VAGUENESS

A. "Designed for Use"

Petitioners launch their assault on the Ordinance by claiming that the phrase "designed for use" found in the definition of "drug paraphernalia" fails to give fair notice which items are prohibited and who is intended as the designer. From this starting point Petitioners argue that the Ordinance permits an accused to be prosecuted and convicted based on the transferred intent of another person.

The standards established by this Court for evaluating vagueness reflect that a municipal ordinance will survive a vagueness challenge if it (1) gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited so he may avoid prosecution and (2) provides explicit standards for its enforcement.[4]

Numerous District Courts and Courts of Appeal have concluded that the term "designed for use" satisfies the vagueness criteria adopted by this Court.[5] Furthermore, this Court recently concluded that "designed

---

[4]See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972).

[5]See, e.g., *Casbah, Inc.* v. *Thone*, *supra*; *Hejira Corp.* v. *MacFarlane*, *supra*; *High Ol'Times, Inc.* v. *Busbee*, *supra*; *Florida Businessmen, Etc.* v. *City of Hollywood*, *supra*; *World Imports, Inc.* v. *Woodbridge*, *supra*; *Deleware Accessories Trade Association* v. *Gebelein*, 497 F.Supp. 289, 291-92 (D.Del. 1980); *Mid-Atlantic Accessories Trade Association* v. *Maryland*, 500 F.Supp. 834, 844-45 (D.Md. 1980).

for use" encompasses items principally used with illegal drugs (1) because of their objective physical features designed by the manufacturer and (2) because a business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer.[6]

Petitioners attempt to distinguish *Hoffman Estates.* However, their arguments are matters of form rather than substance and are calculated to distort the plain, simple and readily understandable language of the Homestead Ordinance. For example, Petitioners emphasize that the Homestead Ordinance, unlike *Hoffman,* does not contain the additional phrase "marketed for use". Petitioners ignore the fact that in addition to the "designed for use" phrase the Homestead Ordinance includes two other states of mind on which the definition of drug paraphernalia depends, i.e. "used" or "intended for use". Furthermore, to insure that Defendants will not be convicted on the transferred intent of others the Eleventh Circuit declared that each of these three states of mind require proof of general criminal intent of the accused.[7] Therefore, it is submitted that no substantive distinction exists between the Homestead Ordinance in which "designed for use" is supplemented by "used" and "intended for use" and the Hoffman Ordinance where "marketed for use" appears as the sole companion of "designed for use". Regardless of

---

[6] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ___ U.S. ___ 102 S.Ct. 1186, 1195, 71 L.Ed.2d 362 (1982).

[7] *Florida Businessmen, Etc. v. City of Hollywood, supra.*, at p. 1219.

the semantics each of the ordinances require proof of the alleged violator's intent.

Petitioners also argue that *Hoffman* is different because it involved a civil licensing ordinance rather than a criminal law which requires greater constitutional scrutiny. However, in *Hoffman Estates* this Court applied a relatively strict vagueness standard because the Ordinance under review was quasi-criminal in nature. 102 S.Ct. at 1194.

The Homestead Ordinance distinguishes between lawful and prohibited objects by scrutinizing the intent of the possessor or user. Innocent objects and users of such items do not fall within the ambit of the Ordinance. Accordingly, "designed for use" does not render the Ordinance unconstitutionally vague.

B. "Legitimate Supplier"

The Homestead Ordinance defines and then prohibits the possession, delivery, manufacture and advertisement of "drug paraphernalia". At the very core of the Ordinance is the definition of the term "drug paraphernalia".[8] Supplementing this definition are twelve (12) subsections detailing a non-exclusive list of objects which are considered "drug paraphernalia" when used, intended for use or designed for use with controlled substances.[9] In addition, the Ordinance also delineates fourteen (14) logically relevant factors which *may* be considered in

[8]Homestead Ordinance Sec. 29-58.1 (A. 4).

[9]Homestead Ordinance Sec. 29-58.1 (A. 4-5).

determining whether a particular object is "drug paraphernalia".[10]

Petitioners limit their vagueness challenge to only one of these fourteen (14) factors—the factor of whether the owner or anyone in control of a particular object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products[11]—claiming that it clouds rather than clarifies prohibited conduct and encourages arbitrary and discriminatory enforcement.

Petitioners' argument on this issue is unsound. First of all, consideration of the "legitimate supplier" factor is permissive, not mandatory. Secondly, it is supplemented by an example which distinguishes head shops covered by the Ordinance from other retail establishments which might sell objects capable of being used for both innocent and unlawful reasons. Thus, the "legitimate supplier" factor does not confuse or cloud prohibited conduct, but actually aids in providing clear, precise notice to potential Defendants of what conduct is unlawful under the Ordinance.

Likewise, the "legitimate supplier" factor does not encourage discriminatory or arbitrary enforcement. Petitioners argued selective enforcement in the proceedings below, but introduced no evidence to support their charges. Furthermore, the overwhelming weight of the evidence before the District Court established

---

[10]Homestead Ordinance Sec. 29-58.1 (A. 7-8).

[11]Homestead Ordinance Sec. 29-58.1 (A. 8).

that the Ordinance had never been enforced against the Petitioners.[12] Moreover, as this Court pointed out in *Hoffman Estates* a facial challenge to the constitutionality of an ordinance is not the appropriate time to litigate claims of selective enforcement even though the risk of discriminatory enforcement may be present.[13] The Eleventh Circuit was correct in finding that the Homestead Ordinance has been drafted with sufficient clarity that the speculative danger of discriminatory and arbitrary enforcement does not make it void for vagueness. Petitioners' claims of selective enforcement should be reviewed only when the possibility of enforcement has ripened into actual prosecution.[14]

C. "Reasonably Should Know"

Petitioners also challenge the Homestead Ordinance for vagueness on the ground that the "reasonably should know" standard found in the violations portion will allow convictions based on constructive knowledge without requiring specific intent.

The "reasonably should know" standard has been approved by virtually every court which has been asked to interpret drug paraphernalia legislation based on

---

[12]See Order Denying Preliminary Injunction, (RA. 2-7); Petitioners' Brief, pp 5-6; Resolution No. 80-07-21, City of Homestead (RA. 9-11); and Order Granting Summary Judgment (A. 31-32).

[13]*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra.*, at 1196.

[14]*Florida Businessmen, Etc. v. City of Hollywood, supra.*, at 1220.

the M.D.P.A. The rationale of these decisions is that for all practical purposes "reasonably should know" means and requires actual knowledge.[15] Furthermore, this standard forms the basis of numerous federal statutes[16] and has been upheld in many other contexts.[17]

Against this backdrop of authority Petitioners rely heavily on the skewed reasoning of the Sixth Circuit in *Record Revolution No. 6 v. City of Parma*, a decision which this Court has on two prior occasions rejected.

Petitioners are correct in their observation that the ordinance in *Hoffman Estates* did not contain a "reasonably should know" standard. However, this Court brushed aside all vagueness attacks in *Hoffman* on the

---

[15]See footnote 1, *supra*.

[16]*See, e.g.*, 8 U.S.C. Section 1185(a)(2); 15 U.S.C. Sections 78dd-1, 78dd-2, 1397, 1916, 2068, 2614; 18 U.S.C. Sections 4921, 922, 954, 1384, 2154, 2423, 2512; 26 U.S.C. Section 999; 42 U.S.C. Sections 263, 5409; 46 U.S.C. Section 1461.

[17]*See, e.g., Selzman v. United States*, 268 U.S. 466, 45 S.Ct. 574 (1925) (sale of denatured alcohol for beverage purposes or under circumstances from which the seller might reasonably have inferred the intent of the purchaser to use it for such purposes); *United States v. Featherston*, 461 F.2d 1119 (5th Cir. 1972), *cert. denied*, 409 U.S. 991 (1972) (teaching or demonstrating use of fire arms, knowing or having reason to know that the same will be unlawfully fully employed . . .). In fact, the two cases cited above went further than the M.D.P.A. in that the courts in those cases upheld the principle that a seller may be required to ascertain the intent of the purchaser without requiring specific intent on the part of the seller.

grounds that the ordinance under scrutiny required scienter or a specific intent to violate its provisions.[18]

It is also important to note that enforcement of "drug paraphernalia" legislation in Florida demonstrates that our state courts have likewise construed the "reasonably should know" standard to require proof of actual knowledge or scienter.[19]

The "reasonably should know" standard provides fair notice to persons of ordinary intelligence of its meaning and application.[20] This standard does not punish innocent or inadvertent conduct, but establishes a scienter requirement. For Petitioners to complain that such a standard requiring actual knowledge is vague is an exercise in absurdity.

III. OVERBREADTH

Petitioners assail the advertising prohibition found in the Homestead Ordinance[21] on the grounds that it is overbroad both as to the types of speech which are

---

[18]*Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., supra.*, at 1195.

[19]*Hutton v. State*, 332 So.2d 686, 687 (Fla. 1st Dist. Ct. App. 1976); *B.S. v. State*, 320 So.2d 459, 461 (Fla. 3d Dist. Ct. App. 1975).

[20]*Gorin v. United States*, 312 U.S. 19, 27-28, 61 S.Ct. 429, 433-434, 85 L.Ed. 488 (1941); *United States v. Featherston, supra; Selzman v. United States, supra.*

[21]Homestead Ordinance Sec. 29-58.4. (A. 9).

restrained and the geographical scope of the restrictions imposed.

Contrary to the unsupported rhetoric of the Petitioners, the Ordinance does not prohibit symbolic or political speech. The clear, unequivocal language of the Ordinance demonstrates that it has been narrowly drawn to regulate only commercial speech which promotes commercial transactions. Equally obvious is the fact that the Ordinance only prohibits advertisements which promote the sale of "drug paraphernalia". Therefore, the Ordinance bans only commercial speech which involves an illegal activity.

The overwhelming weight of authority recognizes that government may prohibit commercial speech which promotes or involves illegal activity or conduct and such speech is not entitled to the protection of the First Amendment.[22]

Petitioners on the other hand take false comfort in their assertion that the Court did not address this issue in *Hoffman Estates*. However, a close reading of *Hoffman* not only indicates that the Court did in fact consider Flipside's free speech objections to the ordinance, but also that the Court summarily rejected them:

---

[22] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 2350-51, 65 L.Ed.2d 341 (1980); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973); *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 761, 96 S.Ct. 1817, 1925, 48 L.Ed.2d 346 (1976); *Casbah, Inc. v. Thone, supra*.

. . . ."The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed 'speech' then it is speech proposing an illegal transaction, which a government may regulate or ban entirely. . . ."

At 102 S.Ct. 1192.

Furthermore, in *Hoffman* the Court observed that it was irrelevant whether the ordinance was overbroad in scope because the overbreadth doctrine does not apply to commercial speech.[23]

The geographical overbreadth argument proffered by the Petitioners is also without merit. The primary thrust or purpose of the Ordinance is to curtail drug abuse within the geographical borders of Homestead, Florida. Homestead has a legitimate interest in stemming the tide of drug abuse which adversely affects the public health, safety, morals and general welfare.[24] Moreover, in deciding what means to employ Homestead can rely on actual or hypothetical facts and can attack only certain aspects of the problem without having to justify its failure to fashion a comprehensive solution.[25] To accomplish its objective the City has enacted legislation

---

[23] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, *supra.*, at 1192.

[24] *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934).

[25] *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

which makes advertisements promoting the sale of "drug paraphernalia" unlawful. Therefore, it is clear that the Ordinance bans such advertising only within the city limits of Homestead. Likewise, it is obvious that the Ordinance only reaches advertising which promotes the sale of drug paraphernalia in Homestead and not in other jurisdictions.

Nevertheless, even assuming the Ordinance attempted to regulate advertising promoting an activity in another community, it would not run afoul of constitutional safeguards because the activity focused on, i.e. the possession, manufacture or delivery of "drug paraphernalia", is illegal throughout the State of Florida.[26] Furthermore, the advertisement of drug paraphernalia in Florida has also been criminalized on a state-wide level.[27] It should also be remembered that these very same Petitioners challenged the constitutionality of the State of Florida's ban on "drug paraphernalia" and the validity of that legislation was upheld by the Eleventh Circuit.[28] Petitioners did not, however, elect to appeal that decision of Eleventh Circuit.

In a belated effort to lend credibility to their geographical overbreadth argument, Petitioners mistakenly rely on *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222 (1975). In *Bigelow*, this Court pointed out that the Virginia statute in question had been amended

---

[26]Fla.Stat. Secs. 893.145-.147 (Supp. 1982).

[27]Fla.Stat. Sec. 893.147(4) (Supp. 1982).

[28]*Florida Businessmen, Etc. v. City of Hollywood, supra.*

to prohibit advertising which encouraged abortion only in Virginia and that as a result of this amendment the issue of overbreadth had become moot for the future. Accordingly, the Court specifically declined to rest its decision on overbreadth.[29] The Court also noted that the advertisement under review, unlike the one considered in the *Pittsburgh Press* case, did more than propose a commercial transaction; it also encompassed and communicated information and opinion of potential interest and value to the public.[30]

In stark contrast to the statute in *Bigelow* the Homestead Ordinance aims only at pure commercial speech which promotes or involves illegal activity or conduct. It does not under even a strained interpretation apply to the communication of information or the dissemination of opinion of potential interest and value to the public, nor does it impede the flow of information about an activity which is legal in another community.

---

[29] *Bigelow v. Virginia*, 421 U.S. 809, 818, 95 S.Ct. 2222, 2230 (1975).

[30] *Bigelow v. Virginia*, 421 U.S. at 821, 95 S.Ct. at 2232.

IV. CONCLUSION

Respondent respectfully submits that the Homestead Ordinance is neither vague or overbroad, nor does it infringe on any First Amendment rights.

The constitutionality of drug paraphernalia legislation patterned as the Homestead Ordinance is after the M.D.P.A. has been upheld by all but two of the Circuit Courts which have considered the issue. Furthermore, in *Hoffman Estates* this Court settled the issues raised by the Petitioners in this case.

Accordingly, the Petition for writ of certiorari filed by the Petitioners should be denied.

RESPECTFULLY SUBMITTED,

H. JACK KLINGENSMITH,
Esquire
Counsel of Record
GUREN, MERRITT, UDELL,
SOGG & COHEN
8th Floor
1200 Brickell Avenue
Miami, Florida 33131
(305) 372-0122

JOHN S. FREUD, Esquire
Of Counsel
GUREN, MERRITT, UDELL,
SOGG & COHEN
8th Floor
1200 Brickell Avenue
Miami, Florida 33131
(305) 372-0122

NO. 82-649

in the
Supreme Court
of the
United States
October Term 1982

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE,
an unincorporated association, and
MERLIN'S MUSIC, INC., a Florida Corporation,

Petitioners,

vs.

THE CITY OF HOMESTEAD, FLORIDA,
A Florida Municipal Corporation,

Respondents.

On Petition For Writ Of Certiorari
From The United States Court Of Appeals For
The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

[FILED MAY 23 1980]

[RECEIVED MAY 27 1980]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-1160-Civ-JCP

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida Corporation,

Plaintiffs,

v.

THE CITY OF HOMESTEAD, FLORIDA, A Florida municipal corporation,

Defendant.

ORDER DENYING PRELIMINARY INJUNCTION

This cause is before the Court on plaintiff's Motion for a Preliminary Injunction pursuant to Rule 65, Federal Rules of Civil Procedure.

Plaintiff, Florida Businessmen for Free Enterprise, is an unincorporated association of wholesalers and retailers who sell merchandise which may be classified as "drug paraphernalia," throughout Florida in general and in the city of Homestead, Florida specifically. Plaintiff,

Merlin's Music, Inc. is a record and "novelty gift" shop located in Homestead, Florida.

Plaintiffs seek to preliminarily enjoin the defendant from enforcing the city of Homestead's Ordinance No. 80-04-28 and any and all conduct incidental to the enforcement of that Ordinance, which prohibits the possession, delivery or advertisement of certain items described as "drug paraphernalia."

The plaintiffs submitted a sworn to affidavit in support of their motion. On May 23, 1980 the motion came on to be heard before the Court. Both parties were represented by counsel and brief argument was heard by the Court. The plaintiff stated that he would rely on his sworn to affidavit and put the plaintiffs on the stand for purposes of cross-examination. Plaintiff's counsel stated that Merlin's Music, Inc. was currently losing $18,000 per month revenues based on the Ordinance, which precluded them from selling the "paraphernalia." There was no proffer as to the losses to be sustained by Florida Businessmen for Free Enterprise. The defendant stated that his witnesses would show that business at Merlin's was substantially unchanged prior to and after the enactment of said Ordinance.

The Court is confronted with a situation where a pending case involving a substantially similar statute (enacted by Hollywood, Florida) is before the Honorable Norman C. Roettger, Jr. There appears to be the need for consolidation of these two cases in the interest of judicial economy.

Based upon the abbreviated hearing and the affidavit of plaintiff (note there was neither response nor

memorandum of law submitted by defendant) the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 FRCP.

There are four prerequisites to be considered prior to this Court issuing interlocutory injunctive relief. These elements are well settled in the law and the parties do not question their validity:

1) The likelihood of success on the merits by the moving party,

2) A showing of irreparable harm to the movant should the injunction not be issued,

3) Balancing the harm to movant if injunction not granted, to the harm to opposing party should injunction be granted.

4) Consideration of Public Policy.

Based upon the case law and memorandum provided, the Court finds that there is a substantial likelihood of success on the merits for movant.

In balancing the possible harm to plaintiff and defendant, the Court finds that the facts are not compelling enough to tilt the scales of justice heavily in favor of either party. The same holds true for the Public Policy consideration.

This leaves the Court with the determination of whether the plaintiff has shown that it will suffer irreparable harm should the injunction not be issued.

The plaintiff, Merlin Music, Inc. claims a loss of $18,000 per month revenues due to the Ordinance, and that as a result of said loss "continues to suffer a substantial loss of income, business, and customers due to compliance with the ordinance, which may result in bankruptcy." The same claim was made for plaintiff, Florida Businessmen, but no loss figures were presented. Neither in sworn to affidavit nor in the proffer of counsel was there any indication of gross revenues so as to more accurately determine whether the reduction in revenues was so substantial that it would cause irreparable harm or possibly bankruptcy to plaintiff. The Court is aware of *Doran v. Salem* that stood for the proposition that if a showing of substantial loss of business was shown, perhaps amounting to possible bankruptcy, the requisite irreparable harm element would have been met. However, in Doran, *supra*, the court stated:

> "* * * respondents alleged (and petitioner did not deny) that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy."

It is not known what proffer of irreparable harm was made to that court. In any event, no denial was made.

This Court finds that there has not been a showing of irreparable harm to plaintiff, Merlin Music, Inc., nor to plaintiff, Florida Businessmen.

In addition, and perhaps even more compelling to this Court, is the problem of adequate remedy at law. The equity jurisdiction of this Court should not be

invoked unless there is no adequate remedy at law. This area necessarily fits within the category of irreparable harm to plaintiff.

In *Wooley v. Maynard*, 430 U.S. 705 (1976) the Court dealt with the problem of a federal court enjoining the enforcement of a state statute and said,

> "It is correct that generally a court will not enjoin "the enforcement of a criminal statute even though unconstitutional," Spielman Motor Co. v. Dodge, 295 U.S. 89, 95 (1935), since "[s]uch a result seriously impairs the concerns for federalism which lie at the heart of Younger," Doran, supra, at 931. But this is not an absolute policy and in some circumstances injunctive relief may be appropriate. "To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." Spielman Motor Co., supra, at 95. We have such a situation here for, as we have noted, three successive prosecutions were undertaken against Mr. Maynard in the span of five weeks. This is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time * * *"

In the case at bar the plaintiffs have not been harassed, nor have bad faith prosecutions been carried out. Instead, as the Court distinguishes in *Wooley*, we are confronted here with a prosecution that is threatened for the first time. Therefore, it does not appear that injunctive relief is appropriate. Further, if the Ordinance

is ultimately found to be invalid plaintiff may have a civil suit for damages against the city of Homestead for economic losses suffered. This would constitute an adequate remedy at law. There has been no proffer that such a remedy does not exist or that in the alternative it is inadequate.

Based on the affidavit, comments of counsel, and being otherwise duly advised it is

ORDERED and ADJUDGED that plaintiff's Motion for a Preliminary Injunction is denied.

DONE and ORDERED at West Palm Beach, Florida, this 23rd day of May, 1980.

/s/ James C. Paine
United States District Judge

cc: Simon, Schindler & Tripp, P.A.
City Attorney

[FILED FEB 26 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 80-1160-Civ-NCR

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, et al.,

Plaintiffs,

vs.

THE CITY OF HOMESTEAD, FLORIDA, etc.,

Defendants,

FINAL JUDGEMENT

This cause came on for hearing before the Court, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the plaintiffs take nothing, that the action be dismissed on the merits, and that defendants recover of plaintiffs their costs of action.

DONE and ORDERED this 25th day of Feb, 1981.

/s/ Norman C. Roettger Jr.

CC: Simon, Schindler & Tripp
Kuvin, Klingensmith & lewis

RESOLUTION NO. 80-07-21

A RESOLUTION OF THE CITY OF HOMESTEAD, FLORIDA, STAYING THE ENFORCEMENT OF ORDINANCE NO. 80-04-28, PROSCRIBING THE SALE AND DELIVERY OF CERTAIN ITEMS VARIOUSLY DESCRIBED AS "DRUG PARAPHERNALIA" AND SETTING FORTH THE CONDITIONS UNDER WHICH SAID STAY OF ENFORCEMENT SHALL BE OPERABLE.

WHEREAS, there is pending in the United States District Court for the Southern District of Florida litigation involving the City of Homestead and certain merchants claiming abridgement of the constitutional rights respecting the sale and delivery of certain articles deemed under Ordinance No. 80-04-28 to be "drug paraphernalia" and,

WHEREAS, the city's legal counsel has advised that damages claimed by the plaintiffs should be mitigated in the eventuality of a judgment against the city and,

WHEREAS, it is in the best interest of the city that such damages, if any, should be mitigated to the greatest degree practicable:

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF HOMESTEAD, DADE COUNTY, FLORIDA:

That the enforcement of Ordinance No. 80-04-28 be and is hereby stayed until final resolution of case

no. 80-1160 Civ-JCP now pending in the United States District Court for the Southern District of Florida and only upon the following conditions:

1. That the plaintiffs make no sales or deliveries to minors, of proscribed articles, in the City of Homestead.

2. That all items cognizable under Ordinance No. 80-04-28 be kept either under lock and key or otherwise physically inaccesible to all persons except plaintiffs' employees.

3. That appropriate signs be posted conspicuously on plaintiff's premises in the City of Homestead to the effect that such items are not to be sold to minors.

4. That all advertisements of plaintiffs promoting the sale or delivery of such items be appropriately captioned to the effect that such items are not for sale or delivery to minors.

5. That plaintiffs submit to reasonable inspections for compliance by agents of the City of Homestead.

PASSED AND ADOPTED this 7th day of July, 1980.

/s/ [Illegible]
Mayor-Councilman

ATTEST:

/s/ Edna B. Pinder
City Clerk

APPROVED AS TO FORM AND CORRECTNESS:

/s/ [Illegible]
City Attorney